PART V

BENEFITS REVIEW BOARD POLICIES AND PROCEDURES

A. SCOPE OF REVIEW

1. Generally; Issues Inadequately Raised and Briefed

The standard of review for the Board in reviewing the decision and order of the administrative law judge granting or denial of benefits is set forth in the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, stating in pertinent part: "findings of fact in the decision under review shall be conclusive if supported by substantial evidence in the record considered as a whole." 33 U.S.C. §921(b)(3). *See* 20 C.F.R. §802.301. This provision was incorporated into the Black Lung Act by 30 U.S.C. §932(a). ***Wilson v. Benefits Review Board***, 748 F.2d 198, 7 BLR 2-38 (4th Cir. 1984). Substantial evidence has been defined as "more than a mere scintilla," or that quantum of evidence that a "reasonable mind might accept as adequate to support a conclusion." ***Universal Camera Corp. v. NLRB***, 340 U.S. 474, 477 (1951); ***McKinney v. Director, OWCP***, 6 BLR 1-1046 (1983).

The Board's scope of review is a narrow one that can be exceeded if it, for instance, engages in the initial consideration of evidence, which is the responsibility of the administrative law judge. *See* ***Bozick v. Consolidation Coal Co.***, 732 F.2d 64, 6 BLR 2-23 *remanded for recon.*, 735 F.2d 1017, 6 BLR 2-119 (6th Cir. 1984). When the administrative law judge does not make the necessary findings, therefore, remand to the administrative law judge is necessary as the Board lacks jurisdiction to provide factual findings to augment any gaps in the administrative law judge's opinion. ***Director, OWCP v. Rowe***, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983). While this review authority limits the scope of action the Board can take, it does not require acceptance of an ultimate finding or inference, if the decision appealed discloses that it was reached in a manner that cannot be accepted as valid. ***Howell v. Einbinder***, 350 F.2d 442, 444 (D.C. Cir. 1965).

The Board has held that it has authority to consider questions of constitutionality arising with respect to the Acts and regulations under its jurisdiction. ***McCluseky v. Zeigler Coal Co.***, 2 BLR 1-1248, 1-1250-62 (1981). The United States Court of Appeals for the Third and Sixth Circuits have reached the same result. ***Gibas v. Saginaw Mining Co.***, 748 F.2d 1112, 7 BLR 2-53 (6th Cir. 1984); ***Carozza v. United States Steel Corp.***, 727 F.2d 74, 6 BLR 2-15 (3d Cir. 1984). For information regarding the constitutionality of specific statutory and regulatory provisions *see* Part I.D. of the Desk Book.

Board review is properly invoked when the appealing party assigns specific allegations of legal or factual error in the administrative law judge's decision. Failure to do so precludes review and requires the Board to affirm the decision below. ***Cox v. Benefits Review Board***, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); ***Sarf v. Director, OWCP***, 10 BLR 1-119 (1987); ***Fish v. Director, OWCP***, 6 BLR 1-107 (1983).

CASE LISTINGS

[Board's review authority does not permit consideration of evidence not submitted into record before adjudication officer below] ***Burks v. Hawley Coal Mining Corp.***, 2 BLR 1-323, 1-326-27 (1979); *see also* ***Sparkman v. Director, OWCP***, 2 BLR 1-488, 1-490 (1979); ***Ellison v. Director, OWCP***, 2 BLR 1-317, 1-318-19 (1979).

[Board will not address constitutionality of regulation where not essential to dispositive issue] ***Sainz v. Kaiser Steel Corp.***, 5 BLR 1-758 (1983).

[remand to fact-finder necessary where additional factual findings are needed as Board does not have jurisdiction to make factual findings] ***Director, OWCP v. Rowe***, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983).

[Sixth Circuit held that question of coverage of Act is generally to be determined through normal appeals process; to invoke district court jurisdiction party must show either patent violation of agency authority or manifest infringement of a substantial right irremediable under the statutory scheme] ***Louisville & Nashville Railroad Co. v. Donovan***, 713 F.2d 1243 (6th Cir. 1983).

[Board has authority to issue summary *per curiam* decisions] ***Kimbrel v. Peabody Coal Co.***, 6 BLR 1-51 (1983).

[unchallenged findings will generally be affirmed on appeal] ***Skrack v. Island Creek Coal Co.***, 6 BLR 1-710 (1983).

[Sixth Circuit held that Board has authority to declare invalid a regulation promulgated by Secretary] ***Gibas v. Saginaw Mining Co.***, 748 F.2d 1112, 7 BLR 2-53 (6th Cir. 1984).

[issue on appeal is whether substantial evidence supports fact-finder's conclusions - not whether evidence can support contrary conclusion] ***Sheranko v. Jones & Laughlin Steel Corp.***, 6 BLR 1-797 (1984).

[where invocation under Section 727.203(a)(1) is affirmable, Board need not consider contentions regarding invocation under alternate subsections] ***Minor v. Alabama By-***

Products Corp., 7 BLR 1-676 (1985); ***McElroy v. Rochester and Pittsburgh Coal Co.***, 6 BLR 1-1197 (1984).

[issues raised but not addressed by Board in a case subsequently remanded back to Board, will be considered if necessary to outcome of case even if the remand order does not specify consideration] ***Murgel v. Consolidation Coal Co.***, 8 BLR 1-29 (1985).

[Fourth Circuit held that Board failed to adhere to substantial evidence review in reversing fact-finder's award of benefits as a matter of law] ***Zbosnik v. Badger Coal Co.***, 759 F.2d 1187, 7 BLR 2-202 (4th Cir. 1985).

[where finding clearly involves specific subsection although not stated, Board will review case to determine whether finding is supported by substantial evidence. ***Wetzel v. Director, OWCP***, 8 BLR 1-139 (1985).

[where issue remanded is dispositive of entitlement under the Act, non-dispositive issues need not be addressed] ***Rematta v. Director, OWCP***, 8 BLR 1-214 (1985).

[Director does not speak for or bind Board by interpretation of a regulation] ***Moore v. Dixie Pine Coal Co.***, 8 BLR 1-334 (1985).

[where Board affirms fact-finder's finding of rebuttal under any subsection of Section 727.203, it is unnecessary to address arguments regarding invocation or alternate rebuttal findings under other subsections] ***Warman v. Pittsburg and Midway Coal Co.***, 8 BLR 1-390 (1985).

DIGESTS

The Board should raise issues *sua sponte* that are fundamental to the fair administration of the Act. ***Mansfield v. Director, OWCP***, 8 BLR 1-445 (1986).

The Board accepted an interlocutory appeal of the administrative law judge's order remanding the case to the district director for further development of the evidence. This case was within the exception to the general rule against hearing appeals from interlocutory orders as the Board found that irreparable harm would result from any further delays in the resolution of this twelve year old claim. ***Morgan v. Director, OWCP***, 8 BLR 1-491 (1986).

The Board has the authority to determine whether a regulation is consistent with the underlying statutory scheme. The rules of interpretation and construction applicable to statutes apply with equal force to regulations. A regulation must be read as a whole and given harmonious, comprehensive meaning. All parts of the regulation, if possible,

are to be given effect. ***Carozza v. United States Steel Corp.***, 727 F.2d 74, 6 BLR 2-15 (3d Cir. 1984); ***Budash v. Bethlehem Mines Corp.***, 9 BLR 1-48 (1986).

The Board will decline to address an issue not raised by a party at the hearing level. ***Kurcaba v. Consolidation Coal Co.***, 9 BLR 1-73 (1986); ***Lyon v. Pittsburgh & Midway Coal Co.***, 7 BLR 1-199 (1984).

The Board must apply the law in effect at the time it renders its decision, unless doing so would result in a manifest injustice or there is statutory discretion or legislative history to the contrary. ***Hill v. Director, OWCP***, 9 BLR 1-126 (1986); *see also* ***Tackett v. Benefits Review Board***, 806 F.2d 640, 10 BLR 2-93 (6th Cir. 1986).

The Board, sitting en banc, grants Director's Motion for Reconsideration and reaffirms its Decision and Order of June 25, 1986, holding that by failing to participate in the original appeal, the Director has waived his right to raise the issue of Trust Fund liability on reconsideration. ***Cornett v. Director, OWCP***, 9 BLR 1-179 (1986).

The Board declined to consider claimant's contention that the administrative law judge erred by failing to find Section 411(c)(4) invocation because the Board affirmed the administrative law judge's findings that claimant was a miner, had pneumoconiosis, and that the pneumoconiosis arose out of claimant's coal mine employment. Under the unique facts of this case, claimant would receive no benefit from the Section 411(c)(4) presumption that he would not otherwise receive by proof of the elements necessary to invoke the presumption. ***Mazgaj v. Valley Camp Coal Co.***, 9 BLR 1-201 (1986).

In a Longshore case, the Board held that liability for attorney fees, although not a matter of district director discretion such as the adequacy of a fee award, is a legal issue which in the absence of contested facts is appealable directly from the district director to the Board. The Board overruled ***Jarrell***, 10 BRBS 423, to the extent it held that attorney fee liability is a non-discretionary act that must first be referred to the administrative law judge. ***Glenn v. Tampa Ship Repair and Dry Dock***, 18 BRBS 205 (1986).

The Board will follow existing case law. ***Bartley v. Director, OWCP***, 12 BLR 1-89 (1988); ***Uhl v. Consolidation Coal Co.***, 10 BLR 1-72 (1987).

The Board has consistently interpreted §802.210 to require the party challenging the administrative law judge's Decision and Order to do more than merely recite evidence favorable to his case; rather the party must identify any alleged error with specificity otherwise there is no basis for review. ***Sarf v. Director, OWCP***, 10 BLR 1-119 (1987); ***Slinker v. Peabody Coal Co.***, 6 BLR 1-465 (1983); ***Fish v. Director, OWCP***, 6 BLR 1-107 (1983); *see also* ***Cox v. Benefits Review Board***, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986) *aff'g sub nom.* ***Cox v. Director, OWCP***, 7 BLR 1-610 (1984); ***Lyon v. Pittsburgh & Midway Coal Co.***, 7 BLR 1-199 (1984); ***Brown v. Island Creek Coal Co.***, 7 BLR 1-858 (1985).

The Sixth Circuit holds that the Board exceeded its narrow scope of review by requiring administrative law judge to re-evaluate the evidence under the facts in this case. Court holds that the test is not whether the Board's decision is supported by substantial evidence, but whether Board was correct in concluding that the administrative law judge's decision was not supported by substantial evidence. ***Campbell v. Consolidation Coal Co.***, 811 F.2d 302, 9 BLR 2-221 (6th Cir. 1987).

Where the administrative law judge has made the necessary findings of fact after discussing all relevant evidence of record, the Board will review the case by applying those findings to the proper regulations. ***Campbell v. Director, OWCP***, 11 BLR 1-16 (1987); ***Hamric v. Director, OWCP***, 6 BLR 1-1091 (1984); *see also* **Shendock v. Director, OWCP**, 861 F.2d 408, 12 BLR 2-48 (3d Cir. 1988); ***Wetzel v. Director, OWCP***, 8 BLR 1-139 (1985).

The Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge. ***Anderson v. Valley Camp of Utah, Inc.***, 12 BLR 1-111 (1989); ***Worley v. Blue Diamond Coal Co.***, 12 BLR 1-20 (1988); ***Rinkes v. Consolidation Coal Co.***, 6 BLR 1-826 (1984).

The Director filed a Motion to Remand for Payment of Benefits stating that upon review of the evidence and the petitioner's arguments on appeal, claimant is entitled to the payment of benefits. The Board accepted the Director's Motion as a withdrawal of controversion of all issues, thereby overruling the holdings in ***Lucas v. Director, OWCP***, 11 BLR 1-61 (1988); ***Myers v. Director, OWCP***, 11 BLR 1-49 (1988)(en banc); ***Blacke v. Director, OWCP***, 11 BLR 1-7 (1987)(en banc); ***Grieco v. Director, OWCP***, 10 BLR 1-139 (1987)(en banc); and ***Putnam v. Director, OWCP***, 8 BLR 1-388 (1985). ***Pendley v. Director, OWCP***, 13 BLR 1-23 (1989)(en banc).

Because employer waived its right to object to the admission of evidence by the administrative law judge, the Board held that employer was precluded from arguing for the first time on appeal that claimant's exhibits were admitted in violation of Section 725.456(d). ***Dankle v. Duquesne Light Co.***, 20 BLR 1-1 (1995).

The Board followed the holding of the Third Circuit that it would not utilize its authority as an adjudicatory tribunal to replace a policy choice of the Director with a policy of the Board, unless it is plainly erroneous or inconsistent with the Act or its implementing regulations. ***Reigh v. Director, OWCP***, 20 BLR 1-44 (1996), *modifying on recon.*, 19 BLR 1-64 (1995).

Where claimant alleges no error in the administrative law judge’s evaluation of the evidence or application of the law, the denial of benefits is affirmed. ***Johnson v. Royal Coal Co.***, 22 BLR 1-132 (2002)(Hall, J., dissenting).

The United States Courts of Appeals have generally given special deference to the Director's position on issues involving the interpretation or application of the Act because the Director is charged with administration of the Black Lung Benefits Act. ***Webber v. Peabody Coal Co.***, 23 BLR 1-123 (2006) (*en banc*) (Boggs, J., concurring), *aff'd on recon.*, BLR (2007)(*en banc*).

The Board recognized that the United States Court of Appeals for the Seventh Circuit has held that "the Director's interpretation of the regulation is controlling unless it is plainly erroneous or inconsistent with the regulation," and further recognized that such deference may not be due where the Director's position is merely an argument crafted for the purposes of litigation, and does not necessarily represent the agency's considered position. Under the facts of this case, however, the Board held that the precise level of deference due the Director's position [regarding the treatment of digital x-rays under the revised regulations] need not be determined as the Board found it both reasonable and persuasive. ***Webber v. Peabody Coal Co.***, 23 BLR 1-123 (2006) (*en banc*) (Boggs, J., concurring), *aff'd on recon.*, BLR (2007)(*en banc*).

The Board reviews the administrative law judge's procedural rulings for abuse of discretion. ***Keener v. Peerless Eagle Coal Co.***, 23 BLR 1-229 (2007)(*en banc*); ***Webber v. Peabody Coal Co.***, 23 BLR1-123 (2006)(*en banc*)(Boggs, J., concurring), *aff'd on recon.*, BLR (2007)(*en banc*); ***Harris v. Old Ben Coal Co.***, 23 BLR 1-98 (2006)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, BLR (2007)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting); ***Dempsey v. Sewell Coal Corp.***, 23 BLR 1-47 (2004)(*en banc*).

In a case involving a determination of which regulations apply to the admissibility of digital x-rays, the Board held that it was generally guided by the principle that an agency's interpretation of its own statutes or regulations is entitled to deference unless it is plainly erroneous or inconsistent with the language at issue. The Board agreed with the Director that in this case, 20 C.F.R. §§718.102, 718.202(a)(1), and 718.107 require consideration of digital x-rays pursuant to Section 718.107. ***Harris v. Old Ben Coal Co.***, 23 BLR 1-98 (2006)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, BLR (2007)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting), citing ***Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.***, 467 U.S. 837, 843, 845 (1984); ***Old Ben Coal Co. v. Director, OWCP* [*Hilliard*]**, 292 F.3d 533, 541 n.8, 22 BLR 2-429, 2-445 n.8 (7th Cir. 2002); ***Freeman United Coal Mining Co. v. Director, OWCP* [*Tasky*]**, 94 F.3d 384, 387, 20 BLR 2-350, 2-355 (7th Cir. 1996).

On reconsideration, the Board held that, under the facts of this case, the Director's adoption of an interpretation of 20 C.F.R. §718.107 as having an implicit numerical limit, *i.e.* one set of results, did not require separate notice and comment. The Board recognized that that 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. ***Webber v. Peabody Coal Co.***, BLR (2007)(*en banc*), *aff'g on recon.*, 23 BLR 1-123 (2006)(*en banc*)(Boggs, J., concurring).

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