U.S. DEPARTMENT OF LABOR

OFFICE OF WORKERS' COMPENSATION PROGRAMS
DIVISION OF COAL MINE WORKERS' COMPENSATION
WASHINGTON, DC 20210

BLBA BULLETIN NO. 14-09

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Subject: Weighing Chest X-ray Evidence that Includes a Negative Reading by Dr. Paul Wheeler

Background: On October 30, 2013, the Center for Public Integrity (CPI), along with ABC News, produced investigative reports highly critical of the x-ray interpretations performed by Dr. Paul Wheeler, an Associate Professor of Radiology at the Johns Hopkins Medical Institutions, in connection with black lung claims. The CPI report in particular indicated that since 2000 in more than 1,500 black lung claims, Dr. Wheeler had never once, in more than 3,400 x-ray readings, interpreted an x-ray as positive for complicated pneumoconiosis. In response to these reports, Johns Hopkins immediately began an internal investigation and suspended the black lung x-ray reading program. Seven months later, the investigation is ongoing and the program remains suspended.

No. 13-1553, viewed 8/28/2015

References: 20 CFR 725.415; 30 USC 923(b).

Purpose: To provide guidance for District Office staff in the consideration of Dr. Wheeler x-ray interpretations that are negative for complicated pneumoconiosis or simple pneumoconiosis.

Applicability: Appropriate DCMWC Personnel.

Guidance: The Black Lung Benefits Act (BLBA) directs that "[i]n determining the validity of claims . . . all relevant evidence shall be considered." 30 U.S.C. 923(b); *but see also* 5 U.S.C. § 556(d) (incorporated by U.S.C. 923(b) through 33 U.S.C. 919(d)) ("Any oral or documentary evidence may be received, but the agency shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence."). The Department has used this statutory authority to limit the amount of medical evidence the parties may submit in a black lung case, and specifically the number of chest x-ray readings a responsible operator may submit to two. *See* 20 C.F.R. 725.414(a)(3)(i). Each x-ray that is conducted and classified in accordance with the quality standards, 20 C.F.R. 718.102, may form the basis for a finding regarding the presence of pneumoconiosis. 20 C.F.R. 718.202. When x-ray readings conflict, consideration shall be given to the radiological qualifications of the readers. *Id.*

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The CPI and ABC News reports, and Johns Hopkins' investigation and suspension of its black lung reading program, are relevant, material and probative evidence regarding Dr. Wheeler's qualifications. Such a consistent record of never diagnosing complicated pneumoconiosis and almost never diagnosing simple pneumoconiosis undermines the credibility of his conclusions and renders them less credible than a positive reading. In addition, the reports demonstrate that Dr. Wheeler's diagnoses have been wrong many times.

This evidence is "hearsay" evidence, namely, out of court statements used to prove the truth of the matter asserted. Hearsay evidence, however, is clearly *admissible* in administrative proceedings in general, and black lung hearings in particular. See 30 U.S.C. 923(b); 42 U.S.C. 405(b) (Social Security Act) incorporated into the Act by 30 U.S.C. 923(b); 33 U.S.C. 923(a) (LHWCA), incorporated into the Act by 30 U.S.C. 932(a); 5 U.S.C. 556(d), incorporated into the Act by 5 U.S.C. 554(c) (APA), 33 U.S.C. 919(d) (LHWCA), and 30 U.S.C. 932(a); 20 C.F.R. 725.455(b) (ALJ in black lung hearings "shall not be bound by common law or statutory rules of evidence ..."). To constitute substantial evidence – evidence that a reasonable person could rely on -- hearsay evidence must carry with it some indicia of trustworthiness or some assurance of probative value and reliability. *E.g.*, *Richardson v. Perales*, 402 U.S. 389, 410 (1971); *Lacson v. Department of Homeland Security,* 726 F.3d 170, 178 (D.C. Cir. 2013); *Evosevich v. Consolidation Coal Co.*, 789 F.2d 1021 (1025) (3d Cir. 1986).

The CPI and ABC reports and Hopkins' suspension are sufficiently trustworthy and reliable to warrant district director consideration when weighing Dr. Wheeler's negative x-ray readings for pneumoconiosis. The CPI report, standing alone, possesses sufficient "indicia of trustworthiness." CPI is a nonpartisan, nonprofit investigative news organization; it conducted a year-long, in-depth investigation in which it reviewed not only the medical evidence in 1,500 cases that Wheeler participated in but also various medical and scientific textbooks and literature. ABC News likewise is a well-respected national news organization. Moreover, Hopkins' response to the reports – immediate suspension of the program – underscores the reports' validity.

No. 13-1553, Viewed 8/28/2015

District directors are therefore instructed to (1) take notice of this reporting and (2) not credit Dr. Wheeler's negative readings for pneumoconiosis in the absence of persuasive evidence either challenging the CPI and ABC conclusions or otherwise rehabilitating Dr. Wheeler's readings.

Section 725.415(b) authorizes the district director to "take such other action as the district director considers appropriate" following the development of evidence pursuant to the Schedule for the Submission of Additional Evidence. If the responsible operator submits a Wheeler x-ray reading, the district director should inform the parties of this news coverage and its consequences and provide them with copies of the reports and articles (or the internet links to applicable websites), and give them a reasonable opportunity to respond. (Attached to this Bulletin is a sample letter providing notice to the parties.) The district director must then consider any responsive evidence in evaluating the conflicting x-ray readings. As instructed above, the district director should accord no weight to Dr. Wheeler's reading unless the responsible operator submits persuasive evidence (or argument) that bolsters Dr. Wheeler's credibility or undermines the CPI and ABC News reports (or the Hopkins' suspension). Should the district director be uncertain as to the evaluation of the responsive evidence, he should contact the National Office. If the responsible operator submits no evidence in response to the district director's letter, the resulting weighing of the x-ray evidence should give no weight to Dr. Wheeler's reading.

Disposition: Retain this Bulletin until further notice or its incorporation into the Black Lung Benefits Procedure Manual.

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Distribution: All DCMWC staff
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No. 13-1553, viewed 8/23/2015