

BRB No. 11-0360 BLA

KIRK L. MILLER)	
)	
Claimant-Respondent)	
)	
v.)	
)	
ASSOCIATED ELECTRIC)	DATE ISSUED: 08/17/2011
COOPERATIVE, INCORPORATED)	
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	ORDER OF DISMISSAL

On February 8, 2011, the Board received employer's appeal of the December 6, 2010 Order of Remand (2006-BLA-06146) and the January 7, 2001 Order Denying Employer's Request for Reconsideration of Administrative Law Judge Alice M. Craft, rendered in the captioned case. The appeal was acknowledged by the Board on February 25, 2011, and assigned BRB No. 11-0360 BLA.

On March 8, 2011, claimant filed a Motion to Dismiss Interlocutory Appeal. 20 C.F.R. §802.401(b). Claimant asserts that employer's appeal is premature because there has been no final decision on the merits of claimant's entitlement to benefits. Employer filed a Response to Claimant's Motion to Dismiss on March 22, 2001. Citing *R.G.B. [Blackburn] v. Southern Ohio Coal Co.*, 24 BLR 1-129 (*en banc*), *appeal dismissed*, No. 09-4294 (6th Cir. Feb. 22, 2010) (unpub. Order) (petition for review dismissed *sua sponte* for lack of a final appealable order), employer argues that the Board should accept its interlocutory appeal. On April 11, 2001, employer also filed a Motion to Suspend Briefing Schedule Pending Resolution of Claimant's Motion to Dismiss.

The record reflects that on November 2, 2010, the administrative law judge issued an Order to Show Cause why the claim should not be remanded to the district director to provide a new Department of Labor (DOL)-sponsored pulmonary evaluation to claimant, as the examination report from Dr. Odger, based on his evaluation of claimant on March 9, 2006, failed to address the issues of total disability and disability causation. Order to

Show Cause at 2. The administrative law judge further noted that, since the examination “took place over five and a half years ago, it does not reflect [claimant’s] current condition.” *Id.* The administrative law judge also reasoned that, based on the date of the report, a supplemental opinion would not suffice to satisfy DOL’s obligations under the regulations. Thus, the administrative law judge gave the parties fifteen days to show cause why claimant was not entitled to receive a new DOL-sponsored pulmonary evaluation. *Id.*

The Director, Office of Workers’ Compensation Programs (the Director), responded to the Show Cause Order, indicating that he had no objection to a remand. Employer, however, maintained that the March 9, 2006 pulmonary evaluation was sufficient to satisfy DOL’s obligation pursuant to 20 C.F.R. §725.406.

In her December 6, 2010 Order of Remand, the administrative law judge determined that claimant had not received a complete pulmonary evaluation and remanded the case to the district director to satisfy his statutory obligation pursuant to 20 C.F.R. §725.406.¹ Inasmuch as the administrative law judge has not made a final determination on the merits of this case, employer’s appeal is interlocutory. Generally, a decision or order of an administrative law judge must be final before the Board will consider an appeal of that decision or order. 30 U.S.C. §932(a). However, the Board will accept an appeal from an Order that is interlocutory in nature if it meets the following three-prong test. First, the order must conclusively determine the disputed question. Secondly, the order must resolve an important issue which is completely separate from the merits of the action. Finally, the order must be effectively unreviewable on appeal from a final judgment. *See Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988); *Canada Coal Co. v. Stiltner*, 866 F.2d 153, 12 BLR 2-115 (6th Cir. 1989).

We conclude that the current appeal fails to satisfy the three-prong test. We specifically reject employer’s argument that the issue presented in the Order of Remand, whether claimant received a complete pulmonary evaluation, is separate from the merits of claimant’s entitlement, as Section 413(b) of the Act, 30 U.S.C. §923(b), as

¹ The Act requires that “[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation.” 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101(a), 725.406. The issue of whether the district director, on behalf of the Department of Labor, has met this duty may arise where “the administrative law judge finds a medical opinion incomplete,” or where “the administrative law judge finds that the opinion, although complete, lacks credibility.” *See Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994); *accord Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-102, 2-105 (8th Cir. 1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 1166, 7 BLR 2-25, 2-31 (8th Cir. 1984).

implemented by 20 C.F.R. §§718.101(a), 725.406, requires that a miner receive a complete pulmonary evaluation in order to substantiate his claim. Moreover, contrary to employer's assertion, the fact that the Board considered employers' interlocutory appeals in *Blackburn* does not mandate consideration of this interlocutory appeal.

In *Blackburn*, the Board accepted the employers' interlocutory appeals of a series of remand orders, issued in five cases by Administrative Law Judge Larry S. Merck, in order to resolve the important procedural issue of whether an administrative law judge may properly exercise his or her remand authority, pursuant to 20 C.F.R. §725.456(e), without notice to the parties and prior to the assembly of the evidentiary record at the hearing. *Blackburn*, 24 BLR at 1-137-44. Apart from this procedural issue, the Board reviewed the evidence in each of the five cases to determine whether the administrative law judge's findings, that claimants had not received a complete pulmonary evaluation, were correct under *Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 641-42, 24 BLR 2-199 (6th Cir. 2009).² *Blackburn*, 24 BLR at 1-144-50. In three of the cases, the Board affirmed Judge Merck's remand orders, but in the other two cases, the Board vacated the remand orders and returned the cases to the administrative law judge for further proceedings on the merits. *Id.* at 1-150-51.

Employer appealed, but the United States Court of Appeals for the Sixth Circuit refused to review the Board's decision in *Blackburn* on the grounds that there was no appealable order. *Blackburn*, No. 09-4294, slip op. at 3. The court concluded that the Board's analysis, as to whether the administrative law judge's remand orders were consistent with *Greene*, is "not entirely separate from the merits of the claims because it involves [review of] the adequacy of the evidence in each of the five cases." *Id.* at 2. The court also dismissed employer's appeal in *Blackburn* on the ground that the Board's decision was reviewable, if necessary, in a future petition for review, from a final decision on the merits. *Id.* at 2-3.

In this case, employer asks the Board to review the adequacy of the evidence in considering whether the administrative law judge's remand order is proper. However, for the reasons stated by the Sixth Circuit in *Blackburn*, we similarly conclude that employer's interlocutory appeal must be dismissed, as the administrative law judge's Order of Remand and Order Denying Employer's Request for Reconsideration: 1) fail to

² The five cases in [*Blackburn*] v. *Southern Ohio Coal Co.*, 24 BLR 1-129 (*en banc*), arose within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. This case, however, arises within the jurisdiction of the United States Court of Appeals for the Eighth Circuit, as claimant's coal mine employment was in Missouri. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-201 (1989) (*en banc*); Director's Exhibit 3.

resolve an important issue separate from the merits of the claim; and 2) remain reviewable, if necessary, in a future appeal, once a decision on the merits of the claim is reached. Thus, employer's appeal in BRB No. 11-0360 BLA is dismissed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge