

BRB No. 04-0849 BLA
Case No. 04-BLA-0079

MALCOLM MORGAN)
)
Claimant-Respondent)
)
v.)
)
WHITAKER COAL CORPORATION)
) DATE ISSUED: 09/30/2004
Employer-Petitioner)
)
DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) ORDER

By letter dated August 12, 2004, the Board acknowledged receipt of employer's appeal of the administrative law judge's Order of Remand issued June 25, 2004 and the administrative law judge's Order Denying Motion for Reconsideration issued July 13, 2004.

The administrative law judge's Order of Remand issued June 25, 2004 and his subsequent Order Denying Motion for Reconsideration are not final. The administrative law judge determined that the U.S. Department of Labor-sponsored pulmonary evaluation of claimant by Dr. Baker does not constitute a well documented and reasoned opinion "sufficient to satisfy the Director's adjudicatory burden under Section 725.406" to provide the miner with a complete and credible pulmonary evaluation. Therefore, the administrative law judge ordered the case be remanded to the District Director to have that office fulfill its statutory and regulatory obligation.

Generally, a decision and order of an administrative law judge must be final before the Board will consider an appeal from that decision. Under certain circumstances, the Board will consider an interlocutory appeal. For the Board to consider an interlocutory appeal it must meet the following three-pronged test. First, the order must conclusively determine the disputed question. Second, the order must resolve an important issue which is completely separate from the merits of the case. Finally, the order must be effectively unreviewable on appeal from a final judgment. *See Canada Coal Co. v.*

Stiltner, 866 F.2d 153, 15 BLR 2-135 (6th Cir. 1989); *see also Gulfstream Aerospace Corp. v. Mayacamus Corp.*, 485 U.S. 271, 108 S.Ct. 1133 (1988). Additionally, the Board will accept an interlocutory appeal if it is necessary to properly direct the course of the adjudicatory process. *See Butler v. Ingalls Shipbuilding, Inc.*, 28 BRBS 114 (1994).

The administrative law judge's Order of Remand dated June 25, 2004 and his subsequent Order Denying Motion for Reconsideration do not meet the three-pronged test, nor does this case require the Board to direct the course of the adjudicatory process. The administrative law judge's actions are fully reviewable after a final decision is issued. *See Tignor v. Newport News Shipbuilding and Dry Dock Co.*, 29 BRBS 135 (1995). Therefore, the Board dismisses employer's appeal as interlocutory.¹

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

¹Any party aggrieved by the administrative law judge's final decision may file an appeal with the Board within thirty (30) days from the date the decision is filed. 33 U.S.C. §921(a), (b); 20 C.F.R. §802.205.