BRB No. 14-0009

JAMES KIMBROUGH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PATRIOT ENVIRONMENTAL SERVICES, INCORPORATED	)	
	)	
and	)	
	)	
ZURICH AMERICAN INSURANCE COMPANY	)	DATE ISSUED: Feb. 24, 2014
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	ORDER

Employer has filed a motion to dismiss claimant's appeal of the district director's letter refusing to schedule a second independent medical examination (IME). Employer asserts that the district director's letter does not constitute a final, appealable compensation order. Claimant responds, urging the Board to deny employer's motion. The Director, Office of Workers' Compensation Programs (the Director), responds in agreement with employer's motion to dismiss. Alternatively, the Director urges the Board to affirm the district director's decision. Because we agree with employer and the Director that no appealable order was issued by the district director, we dismiss claimant's appeal.

Claimant injured his left ankle and knee in a work-related incident on September 12, 2010. He underwent surgery on his left knee and began physical therapy thereafter. Claimant alleges his back was injured during the course of physical therapy. The Office of Administrative Law Judges remanded the case to the district director to schedule an IME pursuant to Section 7(e) of the Act, 33 U.S.C. §907(e). The district director selected

Dr. Murphy, and claimant saw him on August 20, 2013. Dr. Murphy examined claimant and reported: "the only thing I can definitely relate to the September 12, 2010 work-related injury is the continuing problems with his left knee." He stated there was no way to relate any arm injury to the knee injury, and he felt the back injury is unrelated and is probably coincidental. Dir. Resp. exh. A. Because claimant took issue with Dr. Murphy's opinion, as well as the language of the letter referring him to Dr. Murphy, claimant filed a motion with the district director for a second IME. Dir. Resp. exhs. C-D. In response, the district director sent claimant's counsel a letter stating that scheduling another IME "is clearly unwarranted and will serve no useful purpose to resolve disputes in this case[,];" however, he informed the parties they could depose Dr. Murphy. Dir. Resp. exh. E. at 2.

In moving to dismiss claimant's appeal, employer and the Director assert the district director's letter is not a final, appealable order. Claimant responds that the district director's refusal to order another IME is a "final decision" on the matter and therefore is properly appealable to the Board.[1]

Section 802.201(a) of the Board's regulations, 20 C.F.R. §802.201(a), provides that "[a]ny party or party-in-interest adversely affected or aggrieved *by a decision or order* . . . may appeal *a decision or order* of an administrative law judge or [district director]. . . ." (emphasis added). In this case, the district director sent a letter dated September 24, 2013, to claimant's counsel declining to schedule a second IME. The conclusion of the letter states, "If the parties have any questions or comments about this letter please let me know." Dir. Resp. exh. E. at 2. This letter is not a "decision" or an "order," and thus is not a final, appealable action. *See generally Craven v. Director, OWCP*, 604 F.3d 902, 44 BRBS 31(CRT) (5th Cir. 2010); *Healy Tibbitts Builders, Inc. v.*

[1] Section 7(e) of the Act, states in part:

> In the event that medical questions are raised in any case, the Secretary shall have the power to cause the employee to be examined by a physician employed or selected by the Secretary and to obtain from such physician a report containing his estimate of the employee's physical impairment and such other information as may be appropriate. Any party who is dissatisfied with such report may request a review or reexamination of the employee by one or more different physicians employed or selected by the Secretary. The Secretary shall order such review or reexamination unless he finds that it is clearly unwarranted.

33 U.S.C. §907(e). *See* 20 C.F.R. §§702.408-409.

Cabral, 201 F.3d 1090, 33 BRBS 209(CRT) (9th Cir.), *cert. denied*, 531 U.S. 956 (2000); *Potter, et al. v. Electric Boat Corp.*, 41 BRBS 69, 72 n.3 (2007); *Maria v. Del Monte/Southern Stevedore*, 22 BRBS 132 (1989) (*en banc*), *vacating on reconsideration* 21 BRBS 16 (1988). Therefore, claimant's appeal must be dismissed.[2]

Accordingly, we grant employer's motion to dismiss claimant's appeal.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[2] As a result, we express no opinion on the propriety of the district director's declining to schedule a second IME.