BRB No. 11-0408

KRYSTAL J. WILSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NORTHROP GRUMMAN SHIP SYSTEMS, INCORPORATED	)	DATE ISSUED: 03/25/2011
	)	
	)	
Self-Insured Employer-Respondent	)	ORDER

The Board acknowledges receipt of claimant's Notice of Appeal of the administrative law judge's Order on Motion to Compel Medical Treatment and Protective Order Against FCE, issued on February 17, 2011. This appeal is assigned the Board's docket number BRB No. 11-0408. All correspondence relating to this appeal must bear this number. Claimant has additionally filed with the Board a Motion for Protective Order Against Functional Capacity Evaluation and Motion to Compel Medical Treatment. Employer, in response, has filed a motion to dismiss claimant's appeal, contending it is an appeal of an interlocutory discovery order; employer additionally urges the Board to deny claimant's motion for a protective order, asserting that the Board does not have the authority to rule on such motions.

Claimant's claim for benefits arising as a result of an alleged work-related back condition is pending before the administrative law judge. Claimant filed a motion with the administrative law judge seeking an order to compel employer to provide medical treatment and a protective order against employer's request that claimant undergo a functional capacity evaluation. Following a January 26, 2011 conference call, the administrative law judge issued an Order wherein he: 1) denied claimant's motion to compel employer to pay for an evaluation by a neurologist; 2) denied claimant's motion for a protective order; and 3) ordered claimant to cooperate and participate in a functional capacity evaluation paid for by employer. With regard to his decision to deny claimant's request for a protective order, the administrative law judge specifically stated that, should claimant obtain medical evidence indicating that she should not participate in a functional capacity evaluation, she could reapply for a protective order. Order at 3. Claimant appeals the administrative law judge's Order.

Claimant's appeal is of a non-final, or interlocutory, order and the Board ordinarily does not undertake review of non-final orders. *See, e.g., Newton v. P & O Ports Louisiana, Inc.*, 38 BRBS 23 (2004); *Tignor v. Newport News Shipbuilding & Dry Dock Co.*, 29 BRBS 135 (1995). The United States Supreme Court has articulated a three-pronged test to determine whether an order that does not finally resolve litigation is nonetheless appealable. 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 action. Third, the order must be effectively unreviewable on appeal from a final judgment. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988) (collateral order doctrine). If the order at issue fails to satisfy any one of these requirements, it is not appealable. *Id.* at 276. While the Board is not bound by the formal or technical rules of procedure governing litigation in federal courts, *see* 33 U.S.C. §923(a), it has relied on such rules for guidance where the Act and its regulations are silent. *See generally Sprague v. Director, OWCP*, 688 F.2d 862, 869 n.16, 15 BRBS 11, 21 n.16(CRT) (1st Cir. 1982). Thus, where the order appealed from does not satisfy the three-prong test, the Board ordinarily will not grant interlocutory review, unless, in its discretion, the Board finds it necessary to properly direct the course of the adjudicatory process. *See Butler v. Ingalls Shipbuilding, Inc.*, 28 BRBS 114 (1994); *Baroumes v. Eagle Marine Services,* 23 BRBS 80 (1989).

The Board generally declines to review interlocutory discovery orders, as they fail to meet the third prong of the collateral order doctrine, that is, the discovery order is reviewable when a final decision is issued, under the abuse of discretion standard. *See Newton,* 38 BRBS 23; *Tignor*, 29 BRBS 135. If, after a final order is issued, the aggrieved party establishes that the administrative law judge abused his discretion in ordering discovery, the case can be remanded for reconsideration with any wrongly obtained evidence excluded from the record. This case falls within this category. *See generally Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994); *Olsen v. Triple A Machine Shops, Inc.*, 25 BRBS 40 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, Nos. 91-70642, 92-70444 (9th Cir. June 15, 1993). Moreover, the order does not raise due process considerations since the administrative law judge informed claimant that she could seek another protective order should she acquire medical evidence supporting her contention that she should not participate in a functional capacity evaluation. Order at 3; *see generally Niazy v. The Capital Hilton Hotel*, 19 BRBS 266 (1987). In addition, the administrative law judge properly found that employer cannot be held liable for medicals before the claim is adjudicated. As the administrative law judge is afforded broad discretion in authorizing discovery, it is not necessary for the Board to direct the course of the adjudicatory process in this case. *See Newton*, 38 BRBS at 25. Thus, we grant employer's motion to dismiss claimant's appeal of the administrative law judge's interlocutory order.

We also deny claimant's motion that the Board issue an order both protecting her from having to attend an employer-scheduled functional capacity evaluation and compelling employer to provide her with medical care and treatment pursuant to Section

7 of the Act, 33 U.S.C. §907. The Board's grant of authority is derived from Section 21(b) of the Act, 33 U.S.C. §921(b), which states, in pertinent part, that the Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this chapter and the extensions thereof. *See* 33 U.S.C. §921(b)(3); 20 C.F.R. §802.201. Thus, the Board's role is to review appealed decisions in order to ascertain if the findings of fact and conclusions of law are rational, supported by substantial evidence and in accordance with law.[1] *See Mijanjos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). In contrast, the Act grants the administrative law judge as factfinder broad power to direct and authorize discovery in support of the adjudicatory process. *See* 33 U.S.C. §927(a); 5 U.S.C. §556(c); *see generally* 20 C.F.R. §§702.338, 702.341; 29 C.F.R. §18.14 *et seq.* Consequently, as this statutory scheme does not confer on the Board the authority to issue a protective order or to direct claimant's medical treatment, claimant's motion must be denied. *See generally Craven v. Director, OWCP*, 604 F.3d 902, 44 BRBS 31(CRT) (5th Cir. 2010).

Accordingly, claimant's appeal, BRB No. 11-0408, is dismissed. Claimant's motion for a protective order and an order compelling employer to provide medical care and treatment is denied.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge

[1]To the extent claimant implies in her motion that she has evidence establishing that a functional capacity evaluation is inappropriate at this time, she may present that evidence to the administrative law judge for consideration.