BRB No. 11-0806

LUGENE SIMS, SR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CERES GULF, INCORPORATED	)	DATE ISSUED: 03/05/2012
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	ORDER

Employer appeals the August 3, 2011 letter of District Director David A. Duhon in which the district director denied employer's request that claimant be directed to attend a medical examination with Dr. Katz, an orthopedic surgeon.[1]

[1]The issue of whether claimant's refusal to attend an examination with Dr. Katz that had previously been scheduled by employer justified the suspension of claimant's compensation pursuant to Section 7(d)(4) of the Act, 33 U.S.C. §907(d)(4), was before the Board in a previous appeal. In its decision in that case, the Board affirmed the decision of Administrative Law Judge C. Richard Avery denying employer's request for a suspension of benefits under Section 7(d)(4). *Sims v. Ceres Gulf, Inc.*, BRB No. 10-0618 (Mar. 31, 2011) (unpub.). In this regard, the Board upheld the administrative law judge's determination that because Dr. Steiner, employer's initial choice of orthopedic expert, remained capable and available, claimant did not unreasonably refuse to be seen by Dr. Katz, a second orthopedist selected by employer. *Sims*, slip op. at 6. The Board further stated that the administrative law judge reasonably could view employer's motion to compel claimant's attendance at the examination scheduled with Dr. Katz as "doctor shopping." *Id.*

Claimant has filed a Motion to Add to the Procedural Record, requesting that the Board consider the district director's Memorandum of Informal Conference dated December 21, 2011. Employer filed an opposition to claimant's motion to which claimant replied. We grant claimant's motion and, accordingly, consider the Memorandum of Informal Conference in our disposition of employer's appeal.

The Director, Office of Workers' Compensation Programs, has filed a motion to dismiss employer's appeal. She contends that the district director's August 3, 2011 letter does not constitute a final appealable order, that employer impermissibly seeks an advisory opinion regarding the district director's policy regarding examinations by employer-selected physicians, and that the issue of whether claimant's refusal to attend an examination with Dr. Katz was unreasonable has been previously decided by the Board, and the Board's prior decision on that issue constitutes the law of the case. Employer has responded to the Director's motion to dismiss, contending that the Board should entertain its appeal of the district director's August 3, 2011 letter. We conclude that, in light of subsequent events, the legal issue presented by employer's appeal of the district director's August 3, 2011 letter is now moot. We therefore grant the Director's motion to dismiss.[2]

In his August 3, 2011 letter, the district director referenced his June 22, 2010 letter to claimant's attorney addressing his office's general policy regarding an employer's selection of physicians within a particular medical specialty to examine the claimant on behalf of the employer. According to the June 22, 2010 letter, the policy of the district director's office was to limit the employer to one choice of physician within each specialty for the evaluation of the claimant's injury or condition and to allow a change of physicians within a particular specialty only upon a showing of good cause. In the August 3, 2011 letter, which is appealed by employer in this case, the district director reaffirmed this policy. Consistent with that policy, the district director noted that employer had initially selected Dr. Steiner as its orthopedic expert, and advised employer to demonstrate good cause as to why an examination with another orthopedic surgeon should be allowed. Employer's present appeal therefore raises the legal issue of the propriety of the policy regarding examinations by physicians selected by employers

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In its previous appeal to the Board, employer also raised the issue of the propriety of the district director's policy regarding examinations by employer-selected physicians. *Sims*, slip op. at 4. The Board held that this issue was not properly before the Board as employer did not appeal an order of the district director and, in fact, no orders had been issued by the district director. *Id.* at 7.

[2]In view of our dismissal of employer's appeal, employer's motion to strike claimant's opposition to employer's reply brief is moot.

which, in his August 3, 2011 letter, the district director confirmed remained in effect at that time.

Subsequent events, however, reflect that the district director's office no longer adheres to the policy set forth in the district director's June 22, 2010 letter. On December 19, 2011, an informal conference was held, during which employer and claimant presented their opposing positions regarding employer's entitlement to have claimant examined by a second orthopedic surgeon of employer's choosing. The Memorandum of Informal Conference dated December 21, 2011 sets forth the district director's agreement with employer's position that the Act imposes no limitation on an employer's selection of a second physician within a particular medical specialty to examine the claimant. The memorandum additionally states that it is not the district director's policy to interfere with an employer's selection of physicians and that claimants would be encouraged to keep appointments with employer-selected physicians for second opinion examinations. With respect to claimant in particular, the district director recommended that claimant attend an examination with Dr. Katz, as requested by employer. Based on the Memorandum of Informal Conference, the legal issue raised by employer on appeal questioning the propriety of the district director's former policy regarding examinations by employer-selected doctors is now moot. As the district director is no longer relying on his former policy to deny employer's request to have claimant examined by Dr. Katz, and, in fact, recommended that claimant submit to an examination by Dr. Katz, there remains no "substantial question of law or fact" for the Board to decide. 33 U.S.C. §921(b)(3); *see Green v. Ingalls Shipbuilding, Inc.*, 29 BRBS 81 (1995); *Deakle v. Ingalls Shipbuilding, Inc.*, 28 BRBS 343 (1994); *Parker v. Ingalls Shipbuilding, Inc.*, 28 BRBS 339 (1994).

Accordingly, the Director's motion to dismiss employer's appeal is granted.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge