

BRB No. 08-0578 BLA

J.H.)	
)	
Claimant-Respondent)	
)	
v.)	
)	DATE ISSUED: 08/31/2009
MARTIN COUNTY COAL)	
CORPORATION)	
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Order of Remand of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

J.H., Beauty, Kentucky, *pro se*.

Wendy Adkins and William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for the employer.

Helen H. Cox (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order of Remand (2007-BLA-05837) of Administrative Law Judge Larry S. Merck issued on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). Claimant filed his application for benefits on July 27, 2006. Director's

Exhibit 2. The district director issued a Proposed Decision and Order denying benefits on April 9, 2007. Claimant requested a hearing and the case was assigned to Judge Merck (the administrative law judge). By Order of Remand dated April 29, 2008, the administrative law judge determined, *prior to a hearing*, that claimant had not received a complete pulmonary evaluation, as required by Section 413(b) of the Act, 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406. Specifically, the administrative law judge found that Dr. Hussain, who performed the Department of Labor (DOL)-sponsored pulmonary evaluation, had failed to address on Form CM-988, whether claimant was totally disabled, and that “it is unclear whether Dr. Hussain evaluated [c]laimant for both clinical and legal pneumoconiosis.” Order of Remand at 4. Thus, the administrative law judge determined that it was necessary to remand the claim to the district director “for the completion of his evidentiary development responsibilities.” *Id.* at 5. Employer filed this interlocutory appeal with the Board on May 2, 2008, which was acknowledged by the Board on July 15, 2008.¹

Employer asserts that the administrative law judge exceeded his authority under 20 C.F.R. §725.456(e), by issuing his remand order prior to the admission of all of the evidence at the formal hearing and without prior notice to the parties. Employer contends that the administrative law judge erred in concluding that claimant did not receive a complete pulmonary evaluation. However, if the Board affirms the administrative law

¹ The Board originally consolidated this appeal with five other interlocutory appeals filed by different employers, challenging nearly identical Orders of Remand issued by the administrative law judge. *See* Employer’s Motion for Consolidation dated May 2, 2008; *R.G.B. et al. v. Southern Ohio Coal Company et al.*, BRB Nos. 08-0941 BLA, 08-0521 BLA, 08-0463 BLA, 08-0464 BLA and 08-0465 BLA (July 15, 2008) (unpub. Order). The employers filed a motion for oral argument, which was granted by the Board. *See* Consolidated Motion for Oral Argument dated December 23, 2008; *R.G.B. et al. v. Southern Ohio Coal Company et al.*, BRB Nos. 08-0941 BLA, 08-0521 BLA, 08-0463 BLA, 08-0464 BLA, 08-0465 BLA and BRB No. 08-0578 (unpub. Order) (Feb. 19, 2009). However, prior to the oral argument scheduled for April 21, 2009, the Board received on March 23, 2009, a letter from Eric Mills, Esquire, requesting leave to withdraw as counsel for claimant. Mr. Mills also requested that the Board postpone the oral argument for claimant to obtain new counsel. The Board granted counsel’s request to withdraw and severed claimant’s case from the consolidated appeal. *J.H. v. Martin County Coal Corp.*, BRB No. 08-0578 BLA (unpub. Order) (Apr. 9, 2009). We note that while claimant’s case is not part of the consolidated appeals, we continue to rely on the briefs filed by the parties in the consolidated appeals, as they pertain to this case.

judge's Order of Remand, employer requests that the Board transfer liability for benefits to the Black Lung Disability Trust Fund (the Trust Fund).²

The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to uphold the administrative law judge's authority to remand a claim to the district director at any time prior to the termination of the hearing, when the administrative law judge determines that the evaluation sponsored by the DOL is either incomplete or not credible. The Director maintains that an administrative law judge has discretion to exercise his remand authority without conducting a formal hearing and without prior notice to the parties. In response to employer's due process challenge, the Director contends that liability for benefits should not transfer to the Trust Fund. Finally, the Director contends that the administrative law judge properly found that claimant did not receive a complete pulmonary evaluation and, therefore, urges the Board to affirm the administrative law judge's Order of Remand.

The Board's scope of review is defined by statute. The administrative law judge's Orders must be affirmed if they are rational, supported by substantial evidence, and in accordance with applicable law.³ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). The Board reviews the administrative law judge's procedural rulings for abuse of discretion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (*en banc*).

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), as implemented by 20 C.F.R. §§718.101(a), 725.406; *see Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994). The regulation at Section 725.456(e) provides:

If the administrative law judge concludes that the complete pulmonary evaluation provided pursuant to [20 C.F.R.] §725.406, or any part thereof, fails to comply with the applicable quality standards, or fails to address the

² Employer argues that due process requires the transfer of liability for benefits to the Black Lung Disability Trust Fund in all claims where, after the case has been referred to the Office of Administrative Law Judges (OALJ), either an administrative law judge determines or the Director, Office of Workers' Compensation Programs, concedes that a miner did not receive a complete pulmonary evaluation.

³ This claim arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Ohio. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

relevant conditions of entitlement (see [20 C.F.R.] §725.202(d)(2)(i) through (iv)) in a manner which permits resolution of the claim, the administrative law judge shall, in his or her discretion, remand the claim to the district director with instructions to develop only such additional evidence as is required, or allow the parties a reasonable time to obtain and submit such evidence, before the termination of the hearing.

20 C.F.R. §725.456(e).

Employer first argues that the administrative law judge erred in issuing his Order of Remand, pursuant to Section 725.456(e), prior to commencement of the hearing and the admission of all evidence by the parties. Contrary to employer's assertion, the regulations do not constrain the administrative law judge's discretionary authority to determine whether a pulmonary evaluation is complete. The Board has recently decided that an administrative law judge has discretion to exercise his or her remand authority, pursuant to Section 725.456(e), at any time in the adjudicatory process, beginning when the administrative law judge assumes jurisdiction of the claim and ending with the termination of the hearing. *See R.G.B. et al. v. Southern Ohio Coal Company et al.*, --- BLR ---, BRB Nos. 08-0941 BLA, 08-0521 BLA, 08-0463 BLA, 08-0464 BLA and 08-0465 BLA, slip op. at 10 (Aug. 28, 2009) (*en banc*).

Employer also asserts that the administrative law judge erred in issuing his Order of Remand without first obtaining the positions of the parties as to whether the DOL-sponsored pulmonary examination was complete. Relying on Section 725.456(e), which gives the administrative law judge the option to allow the parties to develop evidence to cure defects in the DOL-sponsored pulmonary evaluation, employer argues that the administrative law judge must provide notice to the parties prior to exercising his remand authority pursuant to Section 725.456(e). We disagree.

Contrary to the employer's assertion, there is no explicit notice requirement contained in Section 725.456(e). Rather, Section 725.456(e) gives the administrative law judge *discretion* to either remand a claim to the district director or allow the parties to develop additional evidence to correct defects in the DOL-sponsored pulmonary evaluation. Specifically, Section 725.456(e) provides:

The administrative law judge shall, *in his or her discretion*, remand the claim to the district director with instructions to develop only such additional evidence as is required, or allow the parties a reasonable time to obtain and submit such evidence, before the termination of the hearing.

20 C.F.R. §725.456(e) (emphasis added). Based on the specific language of the regulation, we reject employer's argument that the administrative law judge's remand order violates Section 725.456(e). *See R.G.B. et al.*, slip op. at 11.

Finally, employer asserts that the administrative law judge erred in finding Dr. Hussain's pulmonary evaluation to be incomplete. The United States Court of Appeals for the Sixth Circuit recently set forth the standard for determining whether a pulmonary evaluation is complete and explained:

In the end, the DOL's duty to supply a "complete pulmonary evaluation" does not amount to a duty to meet the claimant's burden of proof for him. In some cases, that evaluation will do the trick. In other cases, it will not. But the test of "complete[ness]" is not whether the evaluation presents a winning case. The DOL meets its statutory obligation to provide a "complete pulmonary evaluation" under 30 U.S.C. § 923(b) when it pays for an examining physician who (1) performs all the medical tests required by 20 C.F.R. §§718.101(a) and 725.406(a), and (2) specifically links each conclusion in his or her medical opinion to those medical tests. Together, the completion of these tasks will result in a medical opinion . . . that is both documented, i.e., based on objective medical evidence, and reasoned.

Greene v. King James Coal Mining, Inc., --- F.3d ---, --- BLR ---, No. 08-4094, slip op. at 18-19, WL 2253369 at *11 (6th Cir. July 30, 2009).

In this case, Dr. Hussain performed the DOL-sponsored pulmonary evaluation on September 27, 2006, which included an x-ray, a pulmonary function study and an arterial blood gas study. Director's Exhibit 11. Dr. Hussain recorded a coal mine employment history of fifteen years and a smoking history of one year (1992-1993) at the rate of one pack of cigarettes per day. *Id.* He completed Form CM-988 and listed pneumoconiosis as the only cardiopulmonary diagnosis. *Id.* Dr. Hussain indicated that he based his diagnosis of pneumoconiosis on the x-ray, pulmonary function study results, a history of coal dust exposure and claimant's symptoms of dyspnea. *Id.* Dr. Hussain described the pulmonary function study as showing restrictive impairment and he opined that claimant had hypoxemia, based on the results of the arterial blood gas study. *Id.* When asked on Form CM-988 to assess "the degree of severity of the impairment, particularly in terms of the extent to which the impairment prevents [claimant] from performing [his] current or last coal mine job of one year's duration," Dr. Hussain wrote, "moderate impairment." *Id.* He further indicated that pneumoconiosis, arising out of coal dust exposure, contributed "100 [percent]" to claimant's diagnosed impairment. *Id.*

In his Order of Remand, the administrative law judge specifically noted that Dr. Hussain did not explain whether claimant's moderate impairment would prevent him from performing his usual coal mine work. The administrative law judge concluded that

“because Dr. Hussain never addressed whether or not [c]laimant was totally disabled from a pulmonary or respiratory standpoint,” his written report did not constitute a complete pulmonary evaluation. Order of Remand at 4. Additionally, the administrative law judge noted that it was “unclear whether Dr. Hussain evaluated [c]laimant for both clinical and legal pneumoconiosis.” *Id.*

Employer asserts that contrary to the administrative law judge’s finding, Dr. Hussain’s report addresses all of the requisite elements of entitlement.⁴ The Director, however, contends that the administrative law judge “reasonably concluded that the extent of claimant’s ability to perform the physical demands of his former coal mine work could not be determined based on Dr. Hussain’s assessment of ‘moderate impairment.’” Director’s Response Brief at 15, *quoting* Director’s Exhibit 11. We agree with the Director that to the extent that Dr. Hussain did not fully answer the questions posed on Form CM-988 as to whether claimant’s moderate impairment would preclude him from performing his usual coal mine work, Dr. Hussain’s written report does not address the issue of total disability, a requisite element of entitlement. *See Greene*, slip op. at 18-19, 2009 WL 2253369 at *11. Thus, we agree that claimant did not receive a complete pulmonary evaluation as required under the Act and described in *Greene*. *Id.* We, therefore, affirm the administrative law judge’s Order of Remand and remand this case to the district director for further evidentiary development to satisfy the Director’s statutory obligation.

Finally, based on the facts of the cases before us, we fail to see how employer is unduly prejudiced by the administrative law judge’s Order of Remand. Specifically we are not persuaded that employer will be unable to mount a meaningful defense based on our affirmance of the administrative law judge’s decision to remand this case for pre-hearing development of the DOL-sponsored pulmonary evaluation. Contrary to employer’s contention, although a remand may result in further delay of the adjudication of this claim, and employer may incur increased litigation costs based on the evidentiary development undertaken by the district director, these possibilities alone do not rise to the level of a due process violation that requires transfer of liability to the Trust Fund. *See Amax Coal Co. v. Director, OWCP [Chubb]*, 312 F.3d 882, 22 BLR 2-514 (7th Cir. 2002). Furthermore, in the absence of a showing that there will be a significant infringement on the due process rights of the parties, we reject employer’s assertion that

⁴ Employer also obtained the deposition testimony of Dr. Hussain on March 12, 2008 and submitted the deposition transcript to the OALJ on April 4, 2008, prior to the issuance of the administrative law judge’s Order of Remand. Although the administrative law judge did not specifically consider the deposition, we note that Dr. Hussain did not provide an opinion during his deposition as to whether claimant could perform his usual coal mine work.

liability must transfer in all claims where, after the claim is forwarded to the Office of Administrative Law Judges, it is determined that a miner did not receive a complete pulmonary evaluation. Thus, we reject employer's contention that liability for benefits must transfer to the Trust Fund. *See R.G.B. et al.*, slip op. at 14.

Accordingly, the administrative law judge's Order of Remand is affirmed and the case is remanded to the district director for further proceedings consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge