BRB Nos. 13-0153 BLA
and 13-0153 BLA-A

FREDDIE WILLIAMS	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
NAVAJO COAL COMPANY	)	DATE ISSUED: 08/29/2014
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Order Denying Motion to Hold Claim in Abeyance of William S. Colwell, Associate Chief Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Nate D. Moore (Penn, Stuart & Eskridge), Bristol, Virginia, for employer.

Ann Marie Scarpino (M. Patricia Smith, Solicitor of Labor; Rae Ellen 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: HALL, Acting Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer cross-appeals, an Order Denying Motion to Hold Claim in Abeyance (2011-BLA-6102), issued by Associate Chief Administrative Law Judge William S. Colwell on December 14, 2012, which compelled claimant to attend a pulmonary examination in connection with employer's modification request. The relevant procedural history of this case is as follows: Claimant filed a claim for benefits pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act), on July 11, 2007. Director's Exhibit 4. The district director awarded benefits on April 17, 2008. Director's Exhibit 19. Employer did not contest the award and began paying benefits to claimant in September 2008. Director's Exhibit 26. On February 18, 2011, pursuant to 20 C.F.R. §725.310, employer requested modification of the award on the ground that there was a mistake in a determination of fact by the district director. Director's Exhibit 38. Employer also submitted a report from Dr. Rosenberg indicating that claimant does not have a totally disabling respiratory impairment. *Id*. The district director issued a proposed decision and order denying employer's request for modification on May 17, 2011, and employer requested a hearing. Director's Exhibits 44-45. Employer scheduled claimant for an examination with Dr. Fino on October 19, 2011, but claimant refused to attend that appointment and a subsequent appointment that employer scheduled for him with Dr. Rosenberg in December 2011. Consequently, employer filed a motion to compel claimant to attend an examination.

Administrative Law Judge Richard T. Stansell-Gamm issued an order on July 31, 2012, indicating that employer could proceed with its modification request and compelling claimant to attend a pulmonary examination scheduled by employer. Judge Stansell-Gamm relied on 20 C.F.R. §725.310(b) to find that employer can require claimant to attend an examination, because the regulation states that the parties are entitled to submit an additional chest x-ray interpretation, pulmonary function and blood gas study, and a medical report on modification. Claimant moved for reconsideration of the order, which Judge Stansell-Gamm denied on October 22, 2012. On November 23, 2012, claimant filed a motion with Judge Stansell-Gamm, requesting that the October 22, 2012 order be held in abeyance, pending the Board's decision in *Kern v. Walcoal, Inc.*, 25 BLR 1-109 (2103), because it involved an identical issue. Employer opposed the motion and, on December 14, 2012, Judge Colwell issued an order denying claimant's motion for abeyance and directing claimant either to attend an examination scheduled by employer or to file an interlocutory appeal with the Board.[1]

[1] The case was apparently transferred from Administrative Law Judge Richard T. Stansell-Gamm to Associate Chief Administrative Law Judge William S. Colwell at some point prior to the issuance of the December 14, 2012 order. However, there is nothing in the record that indicates the reason for this transfer.

On January 2, 2013, claimant filed a request that the Board accept an interlocutory appeal of Judge Colwell's December 14, 2012 order, and of the October 22, 2012 and July 31, 2012 orders by Judge Stansell-Gamm. On the same date, claimant filed a separate motion with the Board to hold the appeal in abeyance until the Board issued a decision in *Kern*. Employer cross-appealed and filed a motion to dismiss claimant's appeal, arguing that it was untimely because claimant did not timely appeal Judge Stansell-Gamm's October 22, 2012 order and, therefore, he could not appeal Judge Colwell's order to "collaterally attack" Judge Stansell-Gamm's order. Employer also argued that the Board should deny claimant's request to hold the case in abeyance, as the decision in *Kern* would not have any effect on the current case. The Board issued an order on April 4, 2013, accepting the interlocutory appeal and granting claimant's motion to hold the case in abeyance. *Williams v. Navajo Coal Co.*, BRB Nos. 13-0153 BLA and 13-0153 BLA-A (April 4, 2013) (unpub. Order). On February 12, 2014, the Board issued an order lifting the abeyance and directing the parties to file briefs. *Williams v. Navajo Coal Co.*, BRB Nos. 13-0153 BLA and 13-0153 BLA-A (Feb. 12, 2014) (unpub. Order).

On appeal, claimant argues that Judge Stansell-Gamm erred in finding that employer had an automatic right to re-examine claimant, based on employer's request for modification, as employer has the burden to prove that any additional testing is necessary. In addition, claimant asserts that Judge Stansell-Gamm erred in finding that granting employer's request for modification would render justice under the Act. In its cross-appeal, employer contends that Judge Colwell did not have the authority to consider claimant's November 23, 2012 motion to hold the denial of motion for reconsideration in abeyance, because Judge Stansell-Gamm's July 31, 2012 and October 22, 2012 orders had become final. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response brief, maintaining that the Board should remand the case to the administrative law judge for him to consider employer's request to have claimant examined, based on the standard set forth in *Kern*.[2]

The material issue raised in claimant's interlocutory appeal and employer's cross-appeal concerns the propriety of the orders issued by Judges Stansell-Gamm and Colwell,

[2] The Director, Office of Workers' Compensation Programs (the Director), noted that he would not address claimant's argument, concerning whether the administrative law judge erred in granting employer's modification request, unless specifically directed to do so. The Director indicated that his response to employer's cross-appeal was not due, as the Board has not yet acted on employer's motion to accept its petition for review and supporting brief out of time. Director's Brief at 1 n.2-3. Although the Board accepted employer's petition for review and brief out of time on June 18, 2014, *Williams v. Navajo Coal Co.*, BRB Nos. 13-0153 BLA and 13-0153 BLA-A (June 18, 2014) (unpub. Order), the Director has not filed a brief in response to employer's cross-appeal.

compelling claimant to appear at a physical examination scheduled by employer in support of its request for modification under 20 C.F.R. §725.310. As indicated in claimant's requests to hold these orders, as well as his interlocutory appeal, in abeyance, the Board was considering this very question in *Kern*. The Board has now issued its decision in *Kern*, holding that an employer who requests an examination of a miner in conjunction with a modification request must initially meet the standard at 20 C.F.R. §725.203(d), which provides that a miner who was finally awarded benefits is only required to attend a new examination if employer "establish[es] the existence of circumstances calling into question the miner's entitlement to benefits." *Kern*, 25 BLR at 1-116. The Board further explained that an administrative law judge must determine, on a case-by-case basis, whether an employer has "raised a credible issue pertaining to the validity of the original adjudication . . . so that an order compelling claimant to submit to examinations or tests would be in the interest of justice." *Id*. at 1-119 (citations omitted).

In light of the issuance of the Board's decision in *Kern*, we hold that claimant's interlocutory appeal and employer's cross-appeal are rendered moot and are, therefore, dismissed. Thus, we remand the case to the administrative law judge to resume his adjudication of`` employer's request for modification. Claimant may file a motion on remand, requesting that the administrative law judge reconsider the order compelling claimant to appear at a physical examination scheduled by employer, based on the standard newly set forth by the Board in *Kern*.

Accordingly, the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge