

BRB No. 99-1018 BLA

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_____)	
WEDO SCICCHITANO)	
)	
Claimant-Petitioner)	
)	DATE ISSUED:
v.)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	DECISION and ORDER

Respondent

Appeal of the Order Remanding Case and Order Denying Reconsideration of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Sarah M. Hurley (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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 and BROWN Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Order Remanding Case and Order Denying Reconsideration (96-BLA-1606) of Administrative Law Judge Ainsworth H. Brown rendered 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). This case is before the Board for the second time. Initially, the administrative law judge credited claimant with five years and three months of coal mine employment, found that the Director, Office of Workers' Compensation Programs (the Director), conceded that claimant was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c), and concluded that claimant's total disability was due to pneumoconiosis arising

out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(c), 718.204(b). Accordingly, the administrative law judge awarded benefits.

Pursuant to the Director's appeal, the Board vacated the administrative law judge's award of benefits because the record indicated that the Director did not concede total disability, and because the administrative law judge's findings under Sections 718.203(c) and 718.204(b) did not comply with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). *Scicchitano v. Director, OWCP*, BRB No. 97-1177 BLA (Apr. 16, 1998)(unpub.). Therefore, the Board remanded the case for further consideration. The Board also instructed the administrative law judge to reconsider his decision to deny the Director's motion to compel a physical examination, since the administrative law judge denied that motion in the mistaken belief that total disability was no longer at issue.

In the first Department of Labor (DOL) pulmonary examination conducted on December 4, 1995, the pulmonary function study was qualifying but invalid. Director's Exhibits 7, 8. A repeat pulmonary function study conducted on February 6, 1996 by a DOL physician was declared valid by one DOL consultant, but was questioned by another DOL consultant who checked the "Vents are acceptable" block on the pulmonary function study evaluation form but nevertheless recommended a repeat pulmonary function study. Director's Exhibits 9, 10, 14.

At that point, the district director ordered claimant to schedule another DOL pulmonary examination. When claimant declined, the district director ordered him to show cause why his claim should not be deemed abandoned if he did not submit to another examination. Claimant again declined, and the district director forwarded the case for a hearing. The Director then moved to compel a new DOL examination. The administrative law judge initially granted the Director's motion, but later denied it when he erroneously concluded that total disability was not at issue.

¹ A "qualifying" pulmonary function study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix B. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1).

On remand, the administrative law judge reopened the record, and claimant submitted to the second DOL examination on June 26, 1998. The pulmonary function study was qualifying but the administering physician noted that claimant's effort was suboptimal. Claimant requested the tracings of this test in order to have the test validated. The Director, however, reported that the requested tracings were unavailable because they "appear[ed] to have been lost through no fault of the Office of Workers Compensation Programs." Director's Motion, October 8, 1998. Consequently, the Director requested an order allowing a new pulmonary function study to be scheduled, *Id.*, which the administrative law judge granted. At the same time, claimant requested and was granted permission to respond to any new pulmonary function study submitted by the Director.

The repeat DOL pulmonary function study was conducted on December 11, 1998 and was qualifying, but the administering physician again noted suboptimal effort. Claimant had the December 11, 1998 study reviewed by Dr. Raymond Kraynak, who declared it a valid study, and claimant also submitted a new pulmonary function study conducted on February 10, 1999, which was qualifying.

A dispute then arose over the admissibility of the June 26, 1998, December 11, 1998, and February 10, 1999 pulmonary function studies. Ultimately, the administrative law judge admitted all three studies into the record. Claimant requested reconsideration of the administrative law judge's ruling on the grounds that the Director should have either the June 26, 1998 or the December 11, 1998 pulmonary function study in the record, but not both, and claimant argued against the admissibility of a DOL consultant's report invalidating a November 21, 1996 pulmonary function study.

² There are no exhibit numbers on any of the evidence submitted on remand.

In response, the administrative law judge issued an order in which he found that there was “[a] dispute” over the validity and admissibility of the November 21, 1996, June 26, 1998, and December 11, 1998 pulmonary function studies. Order of Remand, April 28, 1999. The administrative law judge stated that this dispute “impinge[d] on the requirement that the Claimant receive a credible pulmonary consultation under the auspices of the Director,” and he therefore remanded the case for the district director “to secure [another] examination by a Board Certified pulmonologist” *Id.* Claimant timely requested reconsideration, reporting that he “[did] not wish any more examinations by the Director,” and requesting that the administrative law judge “make a [d]ecision on the record.” Motion for Reconsideration, May 26, 1999. The administrative law judge stamped claimant’s motion for reconsideration “DENIED” on June 3, 1999.

On appeal, claimant contends that the administrative law judge erred in remanding the case for a third pulmonary evaluation. Claimant requests that the Board remand this case for reassignment to a different administrative law judge with instructions to issue a decision on the record. The Director responds, urging affirmance.

We must first address the interlocutory nature of this appeal. “An order that leaves the question of entitlement on the merits unresolved does not constitute a final appealable order.” *Cochran v. Westmoreland Coal Co.*, 21 BLR 1-89, 1-91 (1998). In this case, the administrative law judge did not issue a decision on the merits of the claim, but rather, remanded the case to the district director for another pulmonary evaluation. Claimant, however, urges the Board to consider review under the collateral order exception to the final judgment rule. Claimant's Brief at 15; *see Cohen v. Beneficial Indust. Loan Corp.*, 337 U.S. 541, 546 (1949)(collateral order doctrine).

The collateral order exception to the final judgment rule has been recognized by the Board for the purpose of avoiding undue hardship and inconvenience in the processing of claims. *Morgan v. Director, OWCP*, 8 BLR 1-491, 1-493 (1986). To fall within the collateral order exception, the order must (1) conclusively determine a disputed question, (2) resolve an important issue completely separate from the merits of the claim, and (3) be effectively unreviewable on appeal from a final judgment. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 276 (1988); *Bines v. Kulaylat*, F.3d , 2000 WL 748083 at 3 (3d Cir. 2000); *Cochran*, 21 BLR at 1-92.

Applying those factors in this case, we conclude that the administrative law judge’s orders fall within the collateral order exception to the final judgment rule. First, the administrative law judge’s two orders have conclusively determined that this case must be remanded to the district

director for claimant to undergo a third DOL pulmonary evaluation. Second, whether a basis exists to remand the case for claimant to be examined a third time is an important issue completely separate from the merits of his claim. Third, the administrative law judge's orders remanding the case to the district director will be effectively unreviewable on appeal in the sense that they will have already created further delay by retarding the disposition of the merits of this claim. *See Morgan, supra*. The Director does not argue against accepting the appeal. Therefore, and to avoid undue hardship and inconvenience in this claim pending since 1995, the Board accepts this appeal. *See Cochran, supra; Morgan, supra*.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act 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. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*).

Claimant argues that the administrative law judge abused his discretion by remanding the case for another DOL pulmonary evaluation. The Director responds that the administrative law judge's action was a reasonable exercise of his discretion to remand a claim for further evidentiary development pursuant to Section 725.456(e).

Section 725.456(e) provides that the administrative law judge has the discretion to remand the claim to the district director for the development of additional evidence "[i]f . . . it is determined by the administrative law judge that the documentary evidence . . . is incomplete as to any issue which must be adjudicated" 20 C.F.R. §725.456(e). Here, the administrative law judge did not find the evidence to be incomplete on any issue before him but rather, found only that there was "a dispute" between the parties as to the "validity of certain pulmonary function tests and their admissibility." Order of Remand, April 28, 1999. Section 725.456(e), however, does not authorize remand for the development of additional evidence merely because the evidence conflicts or because the parties object to each other's submissions. Instead, the administrative law judge must resolve such conflicts. *See* 5 U.S.C. §§556(c), 557(c)(3)(A); 20 C.F.R. §725.455(b). Therefore, although the administrative law judge exercises broad discretion in procedural matters, on the facts of this case we conclude that the administrative law judge did not properly exercise that discretion. *See Morgan*, 8 BLR at 1-494. Therefore, we must vacate the administrative law judge's order remanding the case to the district director.

Claimant requests that this case be remanded to a different administrative law judge for a decision on the record. Claimant's Brief at 14-15. Claimant, however, does not allege bias or prejudice on the part of the administrative law judge. *See* 20 C.F.R. §725.352; *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-107-08 (1992); *Zamora v. C.F. & I. Steel Corp.*, 7 BLR 1-568, 1-572 (1984). After reviewing claimant's arguments and the administrative law judge's orders in this claim, we see no basis for ordering that the case be reassigned to a different administrative law judge. Therefore, we will simply remand this case for the administrative law judge to rule on any outstanding motions, to set a date for the record to close and for the parties to file briefs if they so choose, and to issue a decision on the record.

Accordingly, the administrative law judge's Order Remanding Case and Order Denying Reconsideration are vacated and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge