BRB Nos. 98-0241 BLA
and 98-0241 BLA-A

ROY T. PERRY	)	
	)	
Claimant-Respondent	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
CUMBERLAND RIVER COAL CORPORATION	)	DATE ISSUED:
	)	
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Petitioner	)	DECISION and ORDER
Cross-Respondent	)	

Appeal of the Order of Remand and Order Re-Opening Record for Limited Purposes, and the Order Denying Employer's Motion for Reconsideration of Samuel J. Smith, Administrative Law Judge, United States Department of Labor.

Ronald C. Cox (Buttermore, Turner & Boggs, P.S.C.), Harlan, Kentucky, for claimant.

Ronald E. Gilbertson (Kilcullen, Wilson and Kilcullen, Chartered), Washington, D.C., for employer.

Edward Waldman (Judith E. Kramer, Deputy Solicitor; 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: HALL, Chief Administrative Appeals Judge, SMITH and

McGRANERY, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs, (the Director) appeals and employer cross-appeals the Order of Remand and Order Re-Opening Record for Limited Purposes, and the Order Denying Employer's Motion for Reconsideration (93-BLA-1422) of Administrative Law Judge Samuel J. Smith (the administrative law judge) 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). In a Decision and Order dated February 22, 1994, Administrative Law Judge E. Earl Thomas credited claimant with thirty years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. Judge Thomas found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203(b). Judge Thomas also found the evidence sufficient to establish a totally disabling respiratory impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Accordingly, Judge Thomas awarded benefits.

In response to employer's appeal, the Board, citing *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983), affirmed Judge Thomas' unchallenged length of coal mine employment finding and his findings at 20 C.F.R. §§718.203(b) and 718.204. However, the Board vacated Judge Thomas' finding at 20 C.F.R. §718.202(a)(1), and remanded the case to the administrative law judge for further consideration of the evidence. The Board instructed Judge Thomas to consider all of the relevant evidence at 20 C.F.R. §718.202(a)(4) if he finds that the x-ray evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). *Perry v. Cumberland River Coal Corp.*, BRB No. 94-1421 BLA (Aug. 24, 1995)(unpub.).

On remand, the case was reassigned to the administrative law judge who received evidence into the record which had been submitted by claimant and employer.[1] However, the administrative law judge ordered the Director to show cause why the newly submitted x-ray rereadings that the Director submitted should be admitted into the record. The administrative law judge ordered the parties not to submit any additional medical evidence or enter into further discovery in this matter

[1]Claimant submitted a medical report by Dr. Myers, and readings of x-rays dated August 28, 1991 and September 27, 1995. Employer submitted medical reports by Dr. Dahhan, and readings of x-rays dated March 12, 1996 and March 25, 1996.

without his order to do so. The administrative law judge remanded the case to the district director to arrange for a pathological examination of lung tissue and/or tissue slides from claimant's 1984 right pneumonectomy by an impartial Board-certified pathologist at no cost to claimant. The administrative law judge also remanded the case to the district director to arrange for a high resolution CT scan of claimant's chest to be interpreted by a Board-certified radiologist at no cost to claimant. Further, the administrative law judge found that claimant and employer were limited to submitting no more than one medical report in response to the pathological examination and no more than one rereading of the CT scan.

In disposing of employer's request for reconsideration, the administrative law judge excluded the x-ray rereadings submitted by the Director. The administrative law judge also rejected employer's assertion that remanding the case to the district director to arrange for a pathological examination of lung tissue and/or tissue slides at 20 C.F.R. §718.202(a)(4) rather than at 20 C.F.R. §718.202(a)(2) exceeded the scope of the Board's remand instructions. Additionally, the administrative law judge rejected employer's assertion that the pathology report may not support a finding of the existence of pneumoconiosis. Further, the administrative law judge rejected employer's assertion that the record should be reopened to consider causation of total disability at 20 C.F.R. §718.204(b). Moreover, the administrative law judge rejected employer's assertion that limiting the evidence that the parties could submit in response to the pathological examination and the CT scan was improper.

On appeal, the Director contends that this interlocutory appeal falls within the collateral order exception to the final judgment rule. The Director also contends that the administrative law judge exceeded the scope of his authority in ordering the district director to arrange for a high resolution CT scan of claimant's chest to be interpreted by a Board-certified radiologist at no cost to claimant where the record was not incomplete with regard to the issue of whether claimant established the existence of pneumoconiosis.[2] Claimant responds, contending that the Board should dismiss the appeal of the Director because it is interlocutory in nature and does not fall within the collateral order exception to the final judgment rule. Alternatively, claimant contends that it is within the administrative law judge's discretion to determine that a CT scan should be ordered by the district director which should be paid by either employer or the Director.

[2]The Director does not challenge the administrative law judge's remand order to the district director to arrange for a Board-certified pathologist's review of lung tissue samples or tissue slides from claimant's 1984 pneumonectomy. Further, the Director does not object to claimant and employer being afforded an opportunity to adduce a CT scan at their option and expense.

Employer contends that its cross-appeal and the Director's appeal fall within the collateral order exception to the final judgment rule. Employer also contends that the administrative law judge abused his discretion by excluding relevant x-ray rereadings submitted by the Director with regard to the issue of whether claimant has established the existence of pneumoconiosis, and by mandating that the district director arrange for a CT scan of claimant's chest. Further, employer contends that the administrative law judge abused his discretion by limiting employer's right to rebut whatever evidence is presented on remand by either claimant or the Director. In addition, employer argues that the administrative law judge erred by directing that the pathology evidence developed by the district director should be considered at 20 C.F.R. §718.202(a)(4) rather than at 20 C.F.R. §718.202(a)(2). Lastly, employer asserts that the administrative law judge erred by failing to expand the development of the evidence on remand to the issue of causation of total disability at 20 C.F.R. §718.204(b).

Claimant responds to employer's cross-appeal, urging the Board to adopt the contentions that he previously raised in response to the Director's appeal. The Director responds to employer's cross-appeal, contending that employer's cross-appeal does not fall within the collateral order exception to the final judgment rule, but asserting that the Board should consider employer's contentions in the interest of judicial efficiency. The Director contends that the administrative law judge abused his discretion in excluding the x-ray rereadings submitted by the Director and in limiting the evidence that the parties could submit post-hearing.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

An order which leaves the question of entitlement on the merits unresolved does not constitute a final appealable order. *Youghiogheny and Ohio Coal Co. v. Baker*, 815 F.2d 422, 10 BLR 2-8 (6th Cir. 1987). The Board follows the well established rule of federal practice forbidding piecemeal appeals on interlocutory matters. *Christian v. Holmes & Narver, Inc.*, 1 BRBS 85 (1974); *see also Crabtree v. Bethlehem Mines Corp.*, 7 BLR 1-354 (1984). However, the Director contends that the Director's interlocutory appeal falls within the collateral order exception to the final judgment rule. This "narrow exception" to the normal finality requirement, *see Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981); *Redden v. Director,*

OWCP, 825 F.2d 337, 338, 10 BLR 2-201, 2-202 (11th Cir. 1987), has been recognized by the Board for the purpose of avoiding undue hardship and inconvenience in the processing of claims, *see Cochran v. Westmoreland Coal Co.*, 21 BLR 1-89 (1998); *Morgan v. Director, OWCP*, 8 BLR 1-491 (1986)(further delay would create irreparable harm by retarding the disposition of the merits).

The collateral order exception is only applicable when the order appealed satisfies three conditions. The order must: 1) conclusively determine the disputed issue; 2) resolve an important issue completely separate from the merits of the action; and 3) be effectively unreviewable on appeal from a final judgment. *Redden, supra*; *Baker*, 815 F.2d at 425, 10 BLR at 2-12.

In the instant case, we agree with the Director that the three conditions of the collateral order exception are satisfied and therefore we hold that this appeal constitutes an exception to the final judgment rule. Initially, the administrative law judge's orders have conclusively determined that the district director has an obligation to provide a high resolution CT scan of claimant's chest to be interpreted by a Board-certified radiologist at no cost to claimant. Further, the administrative law judge's orders resolved important issues which are separate from the merits of this claim, *i.e.* whether the record should be reopened to admit a high resolution CT scan of claimant's chest to be interpreted by a Board-certified radiologist at no cost to claimant when the x-ray evidence is conflicting, and whether the Director must change how she fulfills her statutory obligation of providing each miner filing a claim with a complete pulmonary evaluation by arranging for a high resolution CT scan of claimant's chest to be interpreted by a Board-certified radiologist at no cost to claimant. Finally, if the Board were to dismiss the Director's appeal because of its interlocutory nature and claimant was thereafter denied benefits, the Director's financial stake in providing the CT scan, as ordered by the administrative law judge, could not be adequately protected, and the administrative law judge's order would be effectively unreviewable on appeal from a final decision and order on the merits of this claim. Therefore, we hold that the Director's interlocutory appeal falls within the collateral order exception to the final judgment rule, and we will address the Director's contentions on appeal. Furthermore, although employer has failed to provide a basis for finding that its cross-appeal falls within the collateral order exception, we will address the contentions raised by employer in the interest of judicial efficiency.

The Director contends that the administrative law judge exceeded the scope of his authority in ordering the district director to arrange for a high resolution CT scan of claimant's chest to be interpreted by a Board-certified radiologist at no cost to

claimant where the record was not incomplete with regard to the issue of whether claimant established the existence of pneumoconiosis. The administrative law judge observed that "there are multiple readings of chest x-ray readers employed by the Director, Claimant and Employer, which are in conflict." Order on Remand and Order Re-Opening Record for Limited Purposes at 6. The administrative law judge also observed that "it would appear that this disparity in conflict can only be resolved by way of a more definitive diagnostic test."[3] *Id*. The administrative law judge, as trier of fact, is charged with evaluating the quality of the evidence and according it appropriate weight. *See*, *e.g.*, *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). In *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), the United States Supreme Court held that when evidence is equally balanced, claimant must lose. While the administrative law judge may reopen the record if the evidence of record is incomplete with regard to an issue,[4] there is no authority for the administrative law judge to reopen the record because the relevant evidence is conflicting. *See* 20 C.F.R. §725.456(e). Moreover, although the regulations permit an administrative law judge to consider other medical evidence which is submitted by the parties, such as a chest CT scan, there is no expectation that the administrative law judge develop such evidence.[5] 20 C.F.R. §718.107. In

[3]The administrative law judge stated that "[t]here seems to be a consensus among most medical experts that the modern day high resolution CT scan of the chest with one to two millimeter sections of the upper, middle and lower lung zones can be an effective medical test in determining the presence or absence of coal workers' pneumoconiosis." Order on Remand and Order Re-Opening Record for Limited Purposes at 6-7.

[4]Section 725.456(e) provides that "[i]f, during the course of a hearing, it is determined by the administrative law judge that the documentary evidence submitted in accordance with this section is **incomplete** as to any issue which must be adjudicated, the administrative law judge may, in his or her discretion, remand the claim to the deputy commissioner 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).

[5]Section 718.107 provides that "[t]he results of any medically acceptable test or procedure reported by a physician not addressed in this subpart which test or procedure tends to demonstrate the presence or absence of pneumoconiosis or the sequelae of pneumoconiosis or the presence or absence of a respiratory or pulmonary impairment, **may** be submitted in connection with a claim and shall be

addition, there is no requirement that the Director fulfill her statutory obligation of providing a complete pulmonary evaluation by including a CT scan of a miner's chest. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.405(b). Thus, we hold that the administrative law judge exceeded the scope of his authority in remanding the case to the district director to arrange for a high resolution CT scan of claimant's chest to be interpreted by a Board-certified radiologist at no cost to claimant.

Employer contends that the administrative law judge abused his discretion by excluding the relevant x-ray rereadings submitted by the Director with regard to the issue of whether claimant established the existence of pneumoconiosis. In response to the x-ray readings submitted on remand by claimant, the Director submitted rereadings by Drs. Barrett and Sargent of an x-ray dated September 27, 1995. The administrative law judge excluded the x-ray rereadings submitted by the Director because the Director did not participate in this matter at the hearing before Judge Thomas or on appeal before the Board, and because this claim does not have issues involving the liability of the Black Lung Disability Trust Fund. Since the Director has been a party-in-interest in all of the stages of adjudication in this case, *see Sloane v. Wolfe Creek Collieries, Inc.* 10 BLR 1-66, 1-69 (1987); *DeLara v. Director, OWCP*, 7 BLR 1-110, 1-112 (1984), we hold that the administrative law judge abused his discretion by excluding the x-ray rereadings submitted by the Director in response to the x-ray readings submitted by claimant, *see York v. Benefits Review Board*, 819 F.2d 134, 19 BLR 2-99 (6th Cir. 1987); *Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989).

Next, employer contends that the administrative law judge erred by directing that the pathology evidence developed by the district director should be considered at 20 C.F.R. §718.202(a)(4) rather than at 20 C.F.R. §718.202(a)(2). The regulations provide for the consideration of pathology evidence at 20 C.F.R. §718.202(a)(2).[6] The Board did not preclude the administrative law judge from

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given appropriate consideration." 20 C.F.R. §718.107 (emphasis added).

[6]In order for a biopsy to be in compliance with the regulations, it must be conducted in accordance with Section 718.106 which provides that "[i]f a surgical procedure has been performed to obtain a portion of a lung, the evidence shall

considering evidence at 20 C.F.R. §718.202(a)(2). Hence, since new pathology evidence is being developed by the district director on remand, we hold that it is appropriate for the administrative law judge to consider any reports based on the biopsy evidence at 20 C.F.R. §718.202(a)(2).

In addition, employer contends that the administrative law judge abused his discretion by limiting employer's right to rebut whatever evidence is presented on remand by either claimant or the Director. The administrative law judge stated that claimant and employer were each limited to no more than one medical report in response to the newly ordered pathological examination and to no more than one rereading of the newly ordered CT scan. In view of our holding that the administrative law judge exceeded the scope of his authority in remanding the case to the district director to arrange for a high resolution CT scan of claimant's chest, any challenge to the limits placed on the rereading of the CT scan by the administrative law judge is moot. However, since the Director does not challenge the administrative law judge's decision to order a pathological examination, the administrative law judge's limitation on the parties with regard to evidence in response to the pathological examination could control. Although there is no rule or policy that has been enacted by Congress or promulgated by the Department of Labor which limits the amount of evidence that the parties can submit in response to other evidence, an administrative law judge has broad discretion in determining what evidence may be submitted post-hearing. Therefore, we reject employer's contention that the administrative law judge abused his discretion in limiting the evidence that the parties may submit on remand. *See Laird v. Freeman United Coal Co.*, 6 BLR 1-883 (1984).

Finally, employer contends that the administrative law judge erred by failing to expand the development of evidence on remand to the issue of causation of total disability at 20 C.F.R. §718.204(b). The administrative law judge stated that "[o]nly if new evidence relevant to the causation issue arises from the further exploration of the evidence shall the causation issue be revisited." Order Denying Employer's Motion for Reconsideration at 7. As previously noted, the Board affirmed Judge Thomas' unchallenged finding that the evidence is sufficient to establish a totally disabling respiratory impairment due to pneumoconiosis at 20 C.F.R. §718.204. *Perry v. Cumberland River Coal Corp.*, BRB No. 94-1421 BLA, slip op. at 2 n.2 (Aug.

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include a copy of the surgical note and the pathology report of the gross and microscopic examination of the surgical specimen." 20 C.F.R. §718.106.

24, 1995)(unpub.). Therefore, since Judge Thomas' finding at 20 C.F.R. §718.204(b), which the Board has affirmed, constitutes the law of the case on this issue, and since there is no persuasive evidence that the law of the case doctrine should not be applied, or that an exception has been shown, we are not persuaded that there is reason for the administrative law judge to revisit this issue on remand.

Accordingly, the administrative law judge's Order of Remand and Order Re-Opening Record for Limited Purposes, and Order Denying Employer's Motion for Reconsideration are affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge