BRB No. 07-0963

L.D.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NORTHROP GRUMMAN SHIP SYSTEMS, INCORPORATED	)	DATE ISSUED: 03/19/2008
	)	
	)	
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Order Suspending Compensation for Refusal to Attend D.O.L. I.M.E. of David A. Duhon, District Director, United States Department of Labor.

Tommy Dulin (Dulin & Dulin), Gulfport, Mississippi, for claimant.

Paul B. Howell (Franke & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

Emily Goldberg-Kraft (Gregory F. Jacob, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order Suspending Compensation for Refusal to Attend D.O.L. I.M.E. (Case No. 07-159420) of District Director David A. Duhon rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of the district director unless they are shown to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See Carter v. Merritt Ship Repair*, 19 BRBS 94 (1986).

The following facts and procedural history are gleaned from the briefs and attachments filed with the Board by claimant's and employer's counsel. Claimant sustained back injuries while working for employer on July 27, 1999, and January 23, 2001. Claimant subsequently sought benefits under the Act and, while the claim was before an administrative law judge, the parties apparently reached an agreement on the contested issues. Accordingly, on January 21, 2004, the administrative law judge issued an Order of Remand and employer commenced the payment of benefits to claimant.

Following an evaluation of claimant by a physician chosen by employer, employer suspended its payment of benefits to claimant and offered claimant modified employment. Claimant declined employer's offer of employment, and an informal conference was held on January 12, 2007. Following the conference, the district director scheduled claimant for a March 7, 2007, examination by an independent medical examiner, Dr. Wolfson, *see* 33 U.S.C. §907(e), and recommended that employer reinstate claimant's benefits. On January 23, 2007, claimant's counsel informed the district director that claimant did not wish to be examined by Dr. Wolfson, that claimant wished to proceed to a formal hearing as soon as possible, and that an LS-18 pre-hearing statement and request for referral to the Office of Administrative Law Judges (OALJ) would be forthcoming.[1] The district director responded to claimant in a letter dated February 12, 2007, wherein he informed claimant's counsel that he would issue an order suspending claimant's compensation benefits due to his unreasonable refusal to submit to the medical examination unless claimant provided some proof that Dr. Wolfson failed to meet the test of an independent medical examiner. *See* 33 U.S.C. §907(i).

On February 16, 2007, the district director referred the case to the Office of Administrative Law Judges (OALJ). In a letter dated February 19, 2007, claimant's counsel informed the district director of claimant's basis for declining to be examined by Dr. Wolfson. The district director responded in a letter dated February 28, 2007, suggesting that claimant's counsel advise claimant to keep the scheduled March 7, 2007,

[1] Claimant filed his LS-18 with the district director on January 31, 2007.

medical appointment.[2] On March 5, 2007, claimant's counsel wrote to the district director informing him of claimant's continued refusal to attend the scheduled medical examination. Thereafter, in an Order dated March 21, 2007, the district director suspended claimant's compensation due to his refusal to attend the scheduled medical examination.

On appeal, claimant contends that, since the case was referred to the OALJ on February 16, 2007, the district director lacked jurisdiction to issue his March 21, 2007 Order.[3] Alternatively, claimant avers that, as Dr. Wolfson is not qualified to serve as an independent medical examiner, claimant cannot be compelled to attend a medical examination by that physician pursuant to Section 7(i) of the Act, 33 U.S.C. §907(i). Employer responds, arguing that the Board should not decide claimant's appeal as it is of an interlocutory order. Alternatively, employer urges affirmance of the district director's Order suspending claimant's compensation. The Director, Office of Workers' Compensation Programs (the Director), has filed a response brief contending that the district director had the authority to suspend claimant's compensation and that the suspension may be affirmed as it is reasonable and within the district director's discretionary authority.

Initially, we reject employer's contention that the Board should not review the district director's Order at this time. While the Board does not ordinarily accept interlocutory appeals, the Board will grant interlocutory review of a non-final order if it is necessary to properly direct the course of the adjudicatory process. *See, e.g., Baroumes v. Eagle Marine Services*, 23 BRBS 80 (1989). In this case, we agree with the Director that the issue raised on appeal by claimant is significant to the parties and the industry. *See Hardgrove v. Coast Guard Exch. Sys.*, 37 BRBS 21 (2003). Accordingly, we will entertain claimant's appeal at this time.

In addressing the contentions raised by claimant on appeal, we initially note that Section 19(c) of the Act, 33 U.S.C. §919(c), imposes a mandatory duty on the district director to transfer a case to the OALJ upon the request of a party. *Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants*, 17 F.3d 130, 28 BRBS 12(CRT) (5th Cir. 1994). In this case, no party challenges the district director's decision on February 16, 2007, to transfer the claim to the OALJ at the request of claimant. Rather, the parties dispute the extent of the authority retained by the district director over the claim after it was transferred to the OALJ.

[2] Claimant's appeal of this letter to the Board, BRB No. 07-0541, was dismissed as premature in an Order dated September 28, 2007.

[3] On August 17, 2007, upon learning of claimant's appeal to the Board, the administrative law judge issued an Order of Remand and Order Cancelling Hearing.

The Act authorizes the Secretary of Labor, through the district directors, to actively supervise the medical care rendered to injured employees.[4] 33 U.S.C. §907; *see* 20 C.F.R. §702.407; *Jackson v. Universal Maritime Serv. Corp.*, 31 BRBS 103 (1997)(Brown, J., concurring). In this regard, Section 7(e) of the Act states, in relevant part, that

> In the event that medical questions are raised in any case, the Secretary shall have the power to cause the employee to be examined by a physician employed or selected by the Secretary. . .

33 U.S.C. §907(e); *see* 20 C.F.R. §702.408. Section 7(f) of the Act states, in relevant part, that,

> An employee shall submit to a physical examination under subsection (e) of this section at such place as the Secretary may require. . . . Proceedings shall be suspended and no compensation shall be payable for any period during which the employee may refuse to submit to examination.

33 U.S.C. §907(f). Section 19(h) of the Act, 33 U.S.C. §919(h), contains identical language regarding the suspension of proceedings and compensation to an employee scheduled for an examination by the Secretary. Neither of these statutory provisions, however, specifically states who has the authority to suspend an employee's compensation upon the employee's refusal to submit to such an examination.[5] The Act's implementing regulations, however, do address this issue; specifically, relevant to this case, Section 702.410(b) states that

> Where an employee fails to submit to an examination required [by the Secretary], the district director or administrative law judge may order that

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[4] Section 7(b) of the Act states:

> The Secretary shall actively supervise the medical care rendered to an injured employee, shall require periodic reports as to the medical care being rendered to injured employees, [and] shall have authority to determine the necessity, character, and sufficiency of any medical aid furnished or to be furnished. . . .

33 U.S.C. §907(b).

[5] In contrast, Section 7(d)(4) of the Act, 33 U.S.C. §907(d)(4), states that if an employee unreasonably refuses to submit to, *inter alia*, an examination by a physician selected by the employer, the Secretary or administrative law judge may, by order, suspend the payment of further compensation during such time as such refusal continues. *See* 20 C.F.R. §702.410(c).

> no compensation otherwise payable shall be paid for any period during which the employee refuses to submit to such examination unless circumstances justified the refusal.

20 C.F.R. §702.410(b). Thus, although, generally, the Act and regulations give to the district directors the authority to supervise medical care, the regulation at Section 702.410(b) distinctly gives to both district directors and administrative law judges the authority to suspend an employee's compensation for failure to attend a medical examination scheduled by the Secretary. *See also* 33 U.S.C. §907(d)(4); 20 C.F.R. §702.410(c).

In this case, the district director on February 16, 2007, referred claimant's claim to the OALJ. Nonetheless, on March 21, 2007, the district director issued an Order Suspending Compensation due to claimant's failure to attend the scheduled medical examination. Claimant contends that the district director lacked authority to issue this order since jurisdiction over the case transferred to the administrative law judge when the case was referred to the OALJ on February 16, 2007. In his response brief, the Director asserts that the broad grant of authority to the Secretary to supervise medical care and specifically to authorize an independent medical examination "in any case" permits the district director to suspend an employee's benefits even after a case has been referred to the OALJ. *See* 20 C.F.R. §702.408.

We agree with claimant that upon the referral of this case to the OALJ, the authority to suspend benefits as a result of the employee's failure to attend a medical examination scheduled by the Secretary transferred to the administrative law judge. While Sections 7(f) and 19(h) of the Act, 33 U.S.C. §§907(f), 919(h), are silent on this issue, Section 702.410(b) of the regulations, 20 C.F.R.§702.410(b), gives the authority for suspending an employee's benefits for failure to attend a scheduled examination to the district director or the administrative law judge.[6] Thus, while both district directors and administrative law judges have suspension authority under the Act, neither the Act nor the regulations state that jurisdiction over this issue exists simultaneously with both

[6] In this regard, we reject the Director's reliance on *Grbic v. Northeast Stevedoring Co.*, 13 BRBS 282 (1980), wherein the Board stated that the suspension of proceedings and compensation payments for failure to submit to an examination under Section 7(f) is within the authority of the Secretary, and not the administrative law judge. 13 BRBS at 288. The Director's reliance upon *Grbic* is misplaced, as that case was issued prior to amendments to the Act's implementing regulations in 1985 which gave administrative law judges, in addition to the district directors, the authority to suspend an employee's compensation for failure to attend a medical examination scheduled by the Secretary. *Compare* 20 C.F.R. §702.410 (1984) *with* 20 C.F.R. §702.410 (1985). *See* 50 Fed.Reg. 402 (Jan. 3, 1985).

the district director and the administrative law judge. To the contrary, there are no provisions in the Act establishing simultaneous jurisdiction over any specific issue.

We are not persuaded by the Director's reliance on the district director's authority to supervise medical care "in any case" as support for his authority to suspend compensation after a case has been referred to the OALJ. *See* 20 C.F.R. §§702.407(d), 702.408. The Director's position ignores the specific language of Section 702.410(b) giving administrative law judges authority over this issue. Moreover, the Director's interpretation that a district director may order the suspension of compensation after a case has been referred to the OALJ allows for the possibility that both a district director and an administrative law judge could issue opposing orders based upon the same evidence or that an administrative law judge could order an employer to pay benefits without incorporating a suspension order issued by the district director. Thus, we decline to accept the Director's interpretation as it is not reasonable in view of the regulation at Section 702.410(b) and the Act's structure for the processing and adjudication of claims. *See generally New Orleans Stevedores v. Ibos*, 317 F.3d 480, 36 BRBS 93(CRT) (5th Cir. 2003), *cert. denied*, 540 U.S. 1141 (2004). Rather, the statute and regulations support a determination that a distinction exists between a district director's authority to supervise an injured employee's medical care, and the authority of either a district director or administrative law judge to sanction an employee for his failure to submit to a medical examination ordered by the Secretary. In the former situation, the Act and its regulations unequivocally provide that the Secretary is to supervise an employee's medical care "at any time," including the scheduling of an independent medical examination. *See* 33 U.S.C. §907(b); 20 C.F.R. §§702.407, 702.408; *Potter v. Electric Boat Co.*, 41 BRBS 69 (2007); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). In the latter scenario, the regulations provide that either the district director or the administrative law judge may suspend an employee's benefits, an action which affects the payment of benefits to an employee. The better interpretation of these provisions is that only the entity before whom the case is pending has the authority to suspend compensation pursuant to Section 7(f) in order to avoid administrative confusion.[7] That is, if the case has been referred to the OALJ, the administrative law judge should rule on the suspension issue along with any other disputed issues concerning claimant's entitlement to benefits. As neither the Act nor regulations allows for simultaneous jurisdiction by a district director and an administrative law judge over the issue of the suspension of an employee's compensation, we hold that only the entity before whom the case is pending may issue an order suspending compensation. In this case, therefore, only the administrative law judge

[7] Moreover, if the case is pending before the district director, and factual findings are necessary to a determination concerning suspension, the district director must refer the case to the administrative law judge. *See* 33 U.S.C. §919(d); *Potter v. Electric Boat Co.*, 41 BRBS 69 (2007); *Sanders v. Marine Terminals Corp.*, 31 BRBS 19 (1997) (Brown, J., concurring).

had the authority to suspend claimant's benefits as of the date the claim was referred to the OALJ, February 16, 2007. Accordingly, we vacate the district director's March 21, 2007, Order as he lacked authority to issue it.

As the administrative law judge, on August 17, 2007, remanded the case to the district director, we remand this case to the district director. In the interest of judicial efficiency, we note that claimant's refusal to submit to the medical examination scheduled by the district director, which resulted in the district director's Order Suspending Compensation, was based upon Section 7(i) of the Act and Section 702.411(c) of the regulations. Section 7(i) states that

> Unless the parties to the claim agree, the Secretary *shall not* employ or select any physician for the purpose of making examinations or reviews under subsection (e) of this section who, during such employment, or during the period of two years prior to such employment, has been employed by, or accepted or participated in any fee relating to a workmen's compensation claim from any insurance carrier or any self-insurer.

33 U.S.C. §907(i)(emphasis added); *see* 20 C.F.R. §702.411(c). In this case, claimant submitted documents to the district director which, he contended, established that Dr. Wolfson could not be utilized as an independent medical examiner. In his Order Suspending Compensation, the district director determined that claimant's evidence did not establish that Dr. Wolfson was either an employee of employer or that he accepted fees from employer. The district director further stated that if all physicians who treated employer's employees were barred from performing independent medical examinations, almost every physician within a reasonable geographic area surrounding employer would be ineligible to conduct independent medical examinations under the Act. *See* Order Suspending Compensation at 2. We cannot accept this latter rationale as it is contrary to the plain language of the Act that the Secretary *shall not* select such a physician to perform an independent medical examination, regardless of whether claimant offers alleged proof of a physician's receipt of payment from employer. As the district director's statement taints his finding, we must vacate the suspension on this ground as well. Accordingly, on remand, the district director must reconsider whether benefits should be suspended in light of the plain language contained in Section 7(i) of the Act.

Accordingly, the district director's Order Suspending Compensation is vacated, and the case remanded to the district director for further proceedings.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge