U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

GODFREY KIKONYOGO	)	BRB No. 24-0077
	)	OALJ No. 2023-LDA-02649
Claimant-Petitioner	)	OWCP No. LS-02456584
	)	
v.	)	
	)	
TRIPLE CANOPY, INC. c/o CONSTELLIS GROUP	)	
	)	
and	)	
	)	
STARR INDEMNITY & LIABILITY COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
	)	
BONEVENTURE KAJUMBI	)	BRB No. 24-0085
	)	OALJ No. 2023-LDA-02663
Claimant-Petitioner	)	OWCP No. LS-02438104
	)	
v.	)	
	)	
CONSTELLIS GROUP	)	
	)	
and	)	
	)	
STARR INDEMNITY & LIABILITY CO. c/o GALLAGHER BASSETT SERVICES	)	DATE ISSUED: 03/21/2024
	)	
Employer/Carrier-Respondents	)	ORDER

Claimant Kikonyogo appeals Administrative Law Judge (ALJ) Angela F. Donaldson's Order Denying Employer/Carrier's Motion to Compel Medical Examination (Kikonyogo Order) (2023-LDA-02649). BRB No. 24-0077. Claimant Kajumbi appeals Chief ALJ Stephen R. Henley's Order Granting Respondents' Motion for a Defense Independent Medical Examination (Kajumbi Order) (2023-LDA-02663).[1] BRB No. 24-0085. Employers move for dismissal of Claimants' appeals, asserting they are of interlocutory orders. Claimants respond, urging the Board to accept their appeals.

Claimants, both citizens of Uganda, filed claims under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§901-950 (Act), as extended by the Defense Base Act, 42 U.S.C. §§1651-1655 (DBA), for alleged psychological injuries related to their overseas employment with Employers. After the claims were referred to the Office of Administrative Law Judges (OALJ), Employers scheduled in-person, psychological defense medical evaluations (DME)[2] with their chosen experts. Claimants objected to the DMEs because Employers' experts are not licensed in Uganda.[3] Employers subsequently moved for orders compelling Claimants' attendance at the DMEs and for the suspension of compensation under Section 7(d)(4), 33 U.S.C. §907(d)(4). Claimants responded in opposition, contending the DMEs violate the Uganda Medical and Dental Practices Act (Uganda Act) and the Uganda Medical and Dental Practitioners Council Code of Ethics, which make it a crime to practice medicine in Uganda without a Ugandan license. Claimants argued the DMEs constitute the practice of medicine in Uganda and are therefore prohibited and, by attending, they would be either abetting or committing a crime. They contend these circumstances justify their refusals to attend the DMEs.

The ALJs denied Employers' motions to compel, each determining they did not have the authority to compel a citizen of Uganda to attend a psychological evaluation taking place in Uganda. Nonetheless, the ALJs rejected Claimants' contentions that the DMEs constitute the illegal practice of medicine in Uganda and that Employers' experts

[1] As common questions of law and fact exist, we consolidate these cases for purposes of this order, 20 C.F.R. §802.104(a). Hereinafter, the parties are collectively referred to as "Claimants" and "Employers."

[2] The DMEs were scheduled to take place in Uganda. Further, although referred to in some places as "independent medical evaluations," these are examinations scheduled by the defending employers.

[3] Employers' experts are licensed in the United States.

must be licensed pursuant to the Uganda Act. Contrarily, the ALJs determined Employers' experts were qualified to conduct psychological evaluations under 29 C.F.R. §18.62(a)(1) and Rule 35 in the Federal Rules of Civil Procedure, Fed. R. Civ. P. 35. ALJ Donaldson determined Claimant's refusal to attend the DME was "not legally justified" and deemed it "unreasonable" under 33 U.S.C. §907(d)(4). Kikonyogo Order at 4-5. Chief ALJ Henley determined Claimant "cannot refuse to attend" the DME on the grounds that Employer's expert was not licensed in Uganda. Kajumbi Order at 4. Both ALJs reserved ruling on Employers' motions for suspension of compensation under Section 7(d)(4) but noted the possibility of sanctions under 29 C.F.R. §18.57(b)(i)-(vi) if Claimants maintained their refusals to attend the DMEs on the grounds that Employers' experts were not licensed in Uganda. Subsequently, Claimants appealed the ALJs' discovery orders.

On appeal, Claimants admit the ALJs' orders are interlocutory but argue they meet the collateral order exception and therefore merit review. Specifically, they contend the ALJs "conclusively determined" Claimants' refusals to attend the evaluations are "unreasonable," the issue of whether Claimants are forced to attend psychological evaluations that are illegal in Uganda is separate from the merits of the claims, and the orders will be effectively unreviewable because Claimants will have already been "forced to participate in a crime" or sanctions will have already been imposed. Claimants further contend this is a "serious due process issue" because Claimants' underlying claims "will be irreparably harmed" if compensation is barred during the period of refusal or if sanctions are imposed. Lastly, they argue the orders violate the OALJ's Administrative Notice, *In re Cases Involving Foreign Parties, Witnesses, and/or Evidence*, 2021-MIS-00006 (Chief ALJ Oct. 5, 2021), as neither party will be able to certify compliance with all applicable legal requirements for the taking of evidence in Uganda. For the following reasons, we decline to consider Claimants' interlocutory appeals.

In order to merit review, appeals of interlocutory orders must satisfy each prong of the "collateral order doctrine." *Gulfstream Aerospace Corp. v. Mayacama Corp.*, 485 U.S. 271, 276 (1988). To fall within the collateral order exception, the Supreme Court of the United States held the appealed order must: (1) conclusively determine the disputed question; (2) resolve an important issue completely separate from the merits of the action; and (3) be effectively unreviewable on appeal from a final judgment. *Gulfstream Aerospace Corp.*, 485 U.S. at 276.[4]

[4] While the Board is not bound by the formal or technical rules of procedure governing litigation in federal courts, *see* 33 U.S.C. § 923(a), we have relied on such rules for guidance when the Act and its regulations are silent. *See generally Sprague v. Director, OWCP*, 688 F.2d 862, 869 n.16 (1st Cir. 1982).

An ALJ is afforded broad discretion in directing and authorizing discovery that is relevant to the subject matter involved in the proceeding, and in a manner "as to best ascertain the rights of the parties." 33 U.S.C. §§919(d), 923(a), 927(a); 20 C.F.R. §§702.338, 702.339; 29 C.F.R. §§18.12, 18.51; *see Goicochea v. Wards Cove Packing Co.*, 37 BRBS 4, 9 (2003). Consequently, discovery orders are reviewable under an abuse of discretion standard after a final order is issued. *Olsen v. Triple A Machine Shops, Inc.*, 25 BRBS 40, 44 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, 996 F.2d 1226 (9th Cir. 1993). The Board generally declines interlocutory review of discovery orders because they typically fail to meet the third prong of the collateral order doctrine. *Newton v. P & O Ports Louisiana, Inc.*, 38 BRBS 23, 26 (2004); *Butler v. Ingalls Shipbuilding, Inc.*, 28 BRBS 114 (1994). The Board, in its discretion, will accept interlocutory review of a discovery order only when it finds it necessary to properly direct the course of the adjudicatory process, *Baroumes v. Eagle Marine Services*, 23 BRBS 80 (1989), or when serious due process issues are raised, *Niazy v. The Capital Hilton Hotel*, 19 BRBS 266 (1987).

Here, the ALJs' discovery orders, which neither award nor deny benefits, are reviewable following final decisions on the merits. *See Olsen*, 25 BRBS at 44. Thus, Claimants' appeals fail to satisfy the elements of the collateral order doctrine. *See Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 108-109 (2009); *Newton*, 38 BRBS at 24-25; *Butler*, 28 BRBS 114. Moreover, although the ALJs discussed the possibility of sanctions under the Act, neither ALJ explicitly compelled attendance at the DMEs or imposed sanctions. *Miller v. Reighter*, 581 F.2d 1181, 1182 (8th Cir. 1978) (declining interlocutory appeal of discovery order that imposed no sanctions "would not render meaningful review at a subsequent time impossible"). While ALJ Donaldson referred to Claimant Kikonyogo's conduct as "unreasonable," she specifically reserved ruling on the suspension of benefits under 33 U.S.C. §907(d)(4) and instructed the parties to brief "if" and "how" that section applies. Chief ALJ Henley, in turn, advised Claimant Kajumbi of the existence of various sanctions for failing to comply with an ALJ order, but did not further analyze the question or impose a sanction. Because the ALJs are actively directing and authorizing discovery and adjudicating the cases, we see no reason to direct the course of proceedings at this time.

While we acknowledge Claimants' arguments that they may suffer a harm through criminal prosecution if they attend the DMEs, we are not persuaded, based on the evidence before us, that this matter requires our "immediate attention." The Uganda Act Claimant relies upon relates to the unauthorized practice of medicine. *See generally Medical and Dental Practitioners Act*, Uganda Legal Information Institute, Open Law Africa, https://ulii.org/akn/ug/act/statute/1996/11/eng@2000-12-31 (revised Dec. 31, 2000) (last visited Jan. 19, 2024) (Uganda); *see also* Kikonyogo Order at 4 ("The laws cited by Claimant concern the unauthorized practice of medicine in Uganda, which is not shown to

penalize the examinee (here, Claimant) or expose him to criminal liability in any way."). Although Claimants allege the DMEs constitute unlawful practice of medicine under the Uganda Act, they point to no evidence supporting their inference that they (as opposed to a physician who violates the law) are subject to penalties for attending a DME.

Claimants also rely upon a more recent "Circular" purporting to require foreign doctors "be licensed and registered with the Uganda Medical and Dental Practitioners Council" before examining, "for litigation purposes," a "patient who resides in Uganda." Kajumbi Order at 2 n.1. But here again, that document addresses the actions of physicians and does not squarely support Claimants' allegations of harm. Nevertheless, should Claimants choose not to attend the DMEs on the basis of the Uganda Act or Circular, actions taken by the ALJs, or sanctions imposed, are subject to the Board's review and therefore rectifiable at a subsequent time.

Accordingly, we grant Employers' motions and dismiss both Claimants' interlocutory appeals.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge