U.S. Department of Labor

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

BRB No. 18-0178 BLA
Case No. 2015-BLA-05674

DAVID SHORT Claimant-Respondent v. TOPMOST COAL COMPANY, INCORPORATED and EMPLOYERS INSURANCE OF WAUSAU, c/o LIBERTY MUTUAL INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/26/2018 ORDER

On January 23, 2018, the Board received employer/carrier's (employer's) notice of appeal of the December 19, 2017 Order of Remand (2015-BLA-05674) of Administrative Law Judge John P. Sellers, III, rendered in the captioned case. The Board acknowledged the appeal on February 21, 2018, and assigned it BRB No. 18-0178 BLA. Employer filed its brief on April 3, 2018, and the Director, Office of Workers' Compensation Programs (the Director), filed a response brief on June 18, 2018.

In the Order of Remand, the administrative law judge determined that claimant did not receive a complete pulmonary evaluation and remanded the case to the district director to satisfy the Department of Labor's statutory obligation pursuant to 20 C.F.R. §725.406.[1] Because the administrative law judge has not made a final determination on the merits of this case, employer's appeal is interlocutory. Generally, an order must be final before the Board will consider an appeal. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a). The Board may accept an interlocutory appeal, however, if the order: 1) conclusively determines the disputed question; 2) resolves an important issue completely separate from the merits; and 3) is effectively unreviewable on appeal from a final judgment. *See Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988); *Canada Coal Co. v. Stiltner*, 866 F.2d 153 (6th Cir. 1989).

Employer asserts that its interlocutory appeal meets these criteria. Employer's Brief at 3. The Director responds that the appeal is premature because the order is reviewable on appeal from a final judgment. Director's Brief at 1-2.

We agree with the Director that the order is reviewable on appeal from a final judgment. *See Miller v. Associated Elec. Coop., Inc.*, 24 BLR 1-234, 1-235-36 (2011) (Order). Moreover, whether claimant received a complete pulmonary evaluation is part of the merits this action, as Section 413(b) of the Act, 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406, requires that a miner receive a complete pulmonary evaluation in order to substantiate his claim. *Id.* Thus, employer's appeal in BRB No. 18-0178 is dismissed for failing to meet two of the three requirements.

[1] The Act requires that "[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101(a), 725.406. The issue of whether the district director, on behalf of the Department of Labor (DOL), has met this duty may arise where the administrative law judge finds that DOL's physician failed to conduct all of the necessary tests, or failed to address all of the necessary elements of entitlement. *Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 640-641 (6th Cir. 2009); *see Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994). The administrative law judge in this case found that claimant did not receive a complete pulmonary evaluation because the DOL physician did not address whether pneumoconiosis is a substantially contributing cause of claimant's totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c). Order of Remand at 1-2.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge