

BRB No. 00-0690 BLA

E.R. GRAVES)	
)	
Claimant-Respondent)	
)	
v.)	
)	
FLOYD MINING COMPANY)	DATE ISSUED:
)	
and)	
)	
ALABAMA INSURANCE GUARANTY ASSOCIATION)	
)	
Employer/Carrier-Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR)	
)	
Petitioner)	DECISION and ORDER

Appeal of the Decision and Order Granting Employer's Motion to Dismiss of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Michael E. Bevers (Nakamura, Quinn & Walls, LLP), Birmingham, Alabama, for claimant.

J. Bentley Owens, III (Starnes & Atchison, LLP), Birmingham, Alabama, for employer.

Rita Roppolo (Judith E. Kramer, Acting 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: HALL, Chief Administrative Appeals Judge, SMITH, Administrative

Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Granting Employer's Motion to Dismiss (99-BLA-536) of Administrative Law Judge Daniel J. Roketenetz dismissing the claim for reimbursement of funds due the Black Lung Disability Trust Fund (Trust Fund) in connection with an award of benefits in 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).¹ The administrative law judge found that the instant case involves a claim by the Director for reimbursement of funds allegedly due the Trust Fund in connection with an award of benefits in this claim. The administrative law judge concluded that the Director failed to establish good cause for failing to appear at the hearing and therefore granted employer's motion to dismiss the case pursuant to 20 C.F.R. §725.465 (2000) and denied the Director's motion that the case be decided on the record. Accordingly, the administrative law judge dismissed the claim. On appeal, the Director contends that the administrative law judge erred in dismissing this claim due to the Director's failure to appear at the hearing. Employer responds urging affirmance of the dismissal of the claim. Claimant responds asserting that the dismissal of the claim was a proper exercise of discretion by the administrative law judge.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if the findings of fact and the conclusions of law are rational, supported by substantial evidence, and in accordance with the law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

¹The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000) (to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 2, 2001, to which claimant, employer and the Director have responded asserting that the regulations at issue in the lawsuit do not affect the outcome of this case.² Based on the briefs submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

The relevant facts of the instant case are as follows:

²Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on March 2, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

Claimant filed his claim for benefits on May 30, 1979.³ Director's Exhibit 1. The District Director awarded benefits and found employer liable for payment. Director's Exhibit 2. Employer requested a hearing before an administrative law judge who awarded benefits on November 22, 1983, and denied employer's reconsideration request on March 6, 1984. Director's Exhibits 7, 11. Employer did not begin payment and on May 2, 1989, the Office of Workers' Compensation Programs ordered employer to begin payment and to reimburse the Trust Fund for interim benefits and medical treatment expenses with interest. Director's Exhibit 12. Employer requested a hearing and the case was subsequently remanded to the district director for further development of evidence relative to claimant's medical expenses. Director's Exhibits 13, 23, 24. Employer continued to dispute amount due and paid \$8,583.99 for medical expenses and interest. Director's Exhibit 33. The Director asserted that employer owed an additional amount of \$17,429.36 for medical expense and interest. Director's Exhibit 46. Employer disputed this amount and requested a hearing. Director's Exhibit 47. The hearing was held on September 29, 1999, in which claimant and employer were present but no appearance was made on behalf of the Director.⁴ Hearing Transcript at 1-5. Employer moved that the case be dismissed. Hearing Transcript at 4. The administrative law judge issued a Show Cause Order on February 8, 2000. The Director responded that it failed to appear "due to oversight and inadvertence" and that it "failed to properly assess the circumstances of this case." The Director also requested that the matter be decided on the record. The administrative law judge issued a decision and order granting employer's motion to dismiss and denying Director's motion to consider the case on the record on March 8, 2000, at issue herein.

The Director is correct in arguing that the administrative law judge erred in dismissing the instant claim without having first obtained the Director's consent. Section 725.465(d) (2000) provides that "[n]o claim shall be dismissed in a case with respect to which payments prior to final adjudication have been made to the claimant in accordance with §725.522, except upon the motion or written agreement of the Director." 20 C.F.R. §725.465(d) (2000). Initially, we note that, although the unexcused failure of a party to attend a hearing constitutes a waiver of that party's right to present evidence at the hearing, *see* 20 C.F.R. §725.461(b) (2000); *see also Prater v. Clinchfield Coal Co.*, 12 BLR 1-121 (1989), the Board has declined to fashion any broader rule regarding the scope of any waiver which may be implicit in a party's failure to attend the hearing. *See Delara v. Director, OWCP*, 7 BLR

³This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit as the miner was employed in the coal mine industry in the State of Alabama. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

⁴It appears that the Director was represented by counsel in the case just prior to this one, but counsel immediately left the building upon its completion. Hearing Transcript at 4-5.

1-110 (1984). The record indicates that pursuant to 20 C.F.R. §725.522 the Trust Fund paid benefits to the miner. Director's Exhibits 2, 7, 11, 12 ????. In light of this information, coupled with the fact that the Director has neither moved for dismissal nor expressed her written agreement to such an action, the administrative law judge erred in dismissing the instant claim. 20 C.F.R. §725.465(d) (2000); *Sizemore v. Shamrock Coal Co., Inc.*, 16 BLR 1-1 (1991); *Palovich v. Bethlehem Mines Corp.*, 5 BLR 1-70 (1982). Consequently, we must vacate the administrative law judge's dismissal of the instant claim and remand the case for consideration of the claim on the merits based upon the current record. *See* 20 C.F.R. §§725.461(b), 725.465(d) (2000).

Accordingly, the administrative law judge's Decision and Order Granting Employer's Motion to Dismiss is vacated and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge