

BRB No. 00-0735 BLA

DWAIN RASNAKE)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
YOGI MINING COMPANY)	
)	
Employer-Respondent)	
)	
)	DATE ISSUED: _____
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Order of Dismissal of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Dwaine Rasnake, Big Rock, Virginia, *pro se*.

Michael F. Blair (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Barry H. Joyner (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 and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant,¹ without the assistance of counsel, appeals the Order of Dismissal (99-BLA-

¹Claimant is Dwaine Rasnake, the miner, who filed his present claim for benefits on March 2, 1998. Director's Exhibit 1. The miner's first claim for benefits, filed on February 18, 1981, was finally denied by the Department of Labor on June 17, 1981. Director's

0845) of Administrative Law Judge Edward Terhune Miller dismissing the miner's third 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).² Applying the regulations at 20 C.F.R. Part 725, the administrative law judge dismissed this case pursuant to 20 C.F.R. §725.465(a)(1), (a)(2) (2000) because claimant failed to show good cause as to why he did not attend the scheduled hearing on March 8, 2000, after being directly ordered to do so. Order of Dismissal at 1-2.

On appeal, claimant asserts that the administrative law judge erred in failing to find good cause for claimant's absence at the hearing. Claimant's Brief at 3-4. Employer responds, urging affirmance of Administrative Law Judge Edward Terhune Miller's dismissal of this claim. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response.³

Exhibits 36-1, 36-6. The miner filed a second claim for benefits on April 21, 1986. Director's Exhibit 37-1. On August 15, 1988, Administrative Law Judge John J. Forbes, Jr. denied benefits. Director's Exhibit 37-49. Claimant filed a timely request for modification, which was finally denied by Administrative Law Judge Frederick D. Neusner on August 14, 1995, after an appeal to the Benefits Review Board. Director's Exhibits 37-50, 37-86, 37-88.

²The Department of Labor 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.

³The Director, Office of Workers' Compensation Programs (the Director), asserts that

the administrative law judge's decision not to waive the formal hearing should be sustained.
Director's Letter at 2.

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 Ass'n 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.⁴ 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.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 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).

The relevant facts are as follows. On December 29, 1998, the district director denied claimant's third claim for benefits. On January 11, 1999, claimant requested a hearing, which was subsequently scheduled with Administrative Law Judge Levin for October 21, 1999. Thereafter, claimant requested that a decision be made on the record and objected to the admission of certain medical evidence submitted by employer.⁵ On October 1, 1999,

⁴Claimant, employer, and the Director assert that the regulations at issue in the lawsuit do not affect the outcome of this case.

⁵Claimant objected to the submission of any medical evidence provided by Dr. Fino or based on an opinion by Dr. Fino. Claimant apparently had submitted letters from the Kentucky Board of Medical Licensors regarding Dr. Fino's medical license, but this evidence is not in the record. Claimant also objected to an exercise blood gas study because he asserts

Judge Levin denied claimant's request for a decision on the record, but informed claimant that he could seek a continuance in order to obtain counsel. Claimant requested a continuance to obtain counsel, which Judge Levin granted.

that this study was not performed in accordance with the regulations.

On December 21, 1999, Administrative Law Judge Edward Terhune Miller [hereinafter, the administrative law judge] issued an order scheduling a hearing for March 8, 2000. Thereafter, claimant sent a letter to the administrative law judge in which he stated that he waives his right to an oral hearing and he requests that a decision be made on the record on account of his inability to obtain counsel.⁶ Claimant had previously requested that certain medical evidence submitted by employer be excluded from the record. By order dated February 3, 2000, the administrative law judge requested that claimant provide a more complete explanation of his request to exclude certain evidence and that employer provide its position on claimant's request for a decision on the record. Both claimant and employer responded to the administrative law judge's order. Employer agreed to a decision on the record only if claimant withdrew his request to exclude certain evidence submitted by employer. In an order dated February 23, 2000, the administrative law judge concluded that employer's objection to a decision on the record be sustained and a hearing be held in this case. By letter dated March 2, 2000, claimant requested a continuance, which the administrative law judge in his Order to Show Cause stated was received on March 7, 2000.

Neither claimant, nor anyone representing claimant, appeared at the hearing held on March 8, 2000. At the hearing, employer moved that the administrative law judge issue a show cause order as to why this case should not be dismissed because of claimant's failure to appear at the hearing. Hearing Transcript at 4. On March 15, 2000, the administrative law judge issued an Order to Show Cause, requesting claimant show cause why "this claim should not be dismissed for failure of claimant or his representative to attend the scheduled hearing. . . ." Order to Show Cause at 2. In claimant's response to the administrative law judge's Order to Show Cause, he stated that it would not have been "prudent" for him to appear at the hearing without counsel and he questioned why employer was never asked to explain why claimant's testimony was needed regarding claimant's objections to some of employer's medical evidence. Employer responded by stating that claimant "has shown no reason why his claim should not [be] dismissed based upon his failure to appear." Employer

⁶Claimant stated that "[i]t would not be in my best interests to appear at an oral hearing, unrepresented, while [the Department of Labor and employer have attorneys defending their interests]."

also stated that claimant's failure to request a continuance,⁷ his failure to appear at the hearing, and his ignoring of the administrative law judge's order should result in the dismissal of his claim.

In his Order of Dismissal, the administrative law judge stated that claimant responded to his Order to Show Cause by reiterating his previous assertion, that it would not be prudent for him to attend a hearing without the assistance of counsel. Order of Dismissal at 1. The administrative law judge noted that claimant was informed of his right to counsel in the Notice of Hearing, dated December 21, 1999, sent to claimant. *Id.* Additionally, the administrative law judge stated that claimant suggested in his response that he did not have sufficient time to properly request a continuance, given the closeness of the date of the administrative law judge's February 23, 2000 order to the March 8, 2000 hearing. *Id.* The administrative law judge noted, however, that claimant previously requested and was granted a continuance in order to obtain counsel in October 1999, just several days prior to the scheduled hearing. *Id.* Additionally, the administrative law judge found that there was no showing of diligence by claimant to obtain counsel during the reasonable period of time he was previously given to do so. *Id.* Furthermore, the administrative law judge rejected claimant's assertion that his request for a decision on the record should have been granted over employer's objection, because employer has not been required to demonstrate how claimant's testimony is essential. Order of Dismissal at 1-2. Therefore, the administrative law judge dismissed this case because claimant did not show good cause for his failure to comply with the administrative law judge's lawful order to appear at the scheduled hearing pursuant to Section 725.465(a)(1), (a)(2) (2000). Order of Dismissal at 2.

⁷In claimant's March 2, 2000 letter, he stated that "he must request another continuance of the hearing if employer's objection is sustained." However, in claimant's March 21, 2000 response to the administrative law judge's Order to Show Cause, he does not explicitly renew his request for a continuance.

We hold that the administrative law judge did not abuse his discretion in dismissing this case. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*); *see also Itell v. Ritchey Trucking Co.*, 8 BLR 1-356 (1985). Although claimant requested that a decision be made on the record, employer did not waive his right to a hearing. Therefore, the administrative law judge properly determined that a hearing in this case must be held. *See* 20 C.F.R. §725.461;⁸ *Churpak v. Director, OWCP*, 9 BLR 1-71 (1986); *see generally Pukas v. Schuylkill Contracting Co.*, 22 BLR 1-69 (2000).

⁸In the amended regulations, Section 725.461 has not been revised.

The pertinent regulations provide an administrative law judge with the authority to dismiss a claim if a claimant fails to appear at the hearing or to comply with a lawful order of an administrative law judge. *See* 20 C.F.R. §725.461(b); 20 C.F.R. §725.465(a)(1), (a)(2) (2000).⁹ Claimant failed to comply with the administrative law judge's February 23, 2000 order to appear at the hearing scheduled on March 8, 2000 and failed to show good cause as to why he did not attend the hearing. Therefore, we hold that the administrative law judge's decision to dismiss this case is in accordance with the law, and, therefore, is affirmed. *See* 20 C.F.R. §725.461(b); 20 C.F.R. §725.465(a)(1), (a)(2), (c) (2000); *Clevinger v. Regina Fuel Co.*, 8 BLR 1-1 (1985); *cf. Howell v. Director, OWCP*, 7 BLR 1-259 (1984).

Accordingly, the administrative law judge's Order of Dismissal is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

⁹In the amended regulations, Section 725.465(a)(1), (a)(2), and (c) applies only to new claims filed after January 19, 2001, and the substantive revisions deal only with the dismissal of responsible operators.