

BRB No. 12-0564 BLA

ROGER L. KELLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DANTE COAL COMPANY	)	DATE ISSUED: 08/14/2013
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Order of Dismissal and Remand of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Roger L. Kelley, Phillippi, West Virginia, *pro se*.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Order of Dismissal and Remand (2011-BLA-5850) of Administrative Law Judge Richard A. Morgan, with respect to a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). The administrative law judge dismissed the claim because claimant did not appear at a physical examination scheduled by employer, or at the hearing scheduled by the administrative law judge, and did not respond to the administrative law judge's Order to Show Cause. On appeal, claimant generally challenges the administrative law judge's dismissal order. Employer has not responded. The Director, Office of Workers' Compensation Programs (the Director), has submitted a letter stating that he will not file a substantive response, unless specifically requested to do so by the Board.

In this appeal of a procedural ruling, filed by a claimant who is proceeding without the assistance of counsel, the Board considers the issue raised to be whether the administrative law judge's Order of Dismissal and Remand constitutes an abuse of discretion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc). The relevant procedural history of this case is as follows. Claimant filed an application for benefits on May 12, 2010. Director's Exhibit 1. The district director denied the claim on April 4, 2011, and claimant requested a hearing. Prior to the hearing, employer informed claimant by letter dated September 22, 2011 that, at claimant's request, his physical examination, scheduled for September 21, 2011, had been rescheduled for December 7, 2011. Claimant did not respond, nor did he appear for the examination. Employer filed a motion to dismiss the claim, based on claimant's failure to appear. The administrative law judge instructed employer to reschedule the examination and to notify claimant of its date, time and location. May 16, 2012 Order Compelling Physical Examination at 1. In addition, the administrative law judge ordered claimant to attend unless, within five days of receiving notification, "he demonstrates why he cannot reasonably attend the examination." *Id.* The administrative law judge further ordered the parties to appear at a hearing scheduled for June 14, 2012. *Id.* at 2.

Employer informed claimant that Dr. Basheda would examine him on May 30, 2012, in Canonsburg, Pennsylvania. The administrative law judge received a letter from the claimant stating that, due to his disability, he could not travel to the place of the examination, which was more than 100 miles from his home. Employer responded that the distance was actually 93.64 miles by road from claimant's home in Phillippi, West Virginia and, therefore, within the distance allowed under 20 C.F.R. §725.414(a)(3)(i). Employer further maintained that Dr. Basheda was the physician of employer's choosing closest to claimant's residence. The administrative law judge ordered claimant to either attend the examination, or provide "a physician's statement, or other documentation of total disability which prevents him from doing so." May 25, 2012 Order Compelling Claimant to Attend Physical Examination at 1. Claimant did not reply and did not appear at either the examination or the hearing.

The administrative law judge issued an order requiring claimant to "show good cause for his failure to attend the scheduled exam and the June 14, 2012 hearing." June 15, 2012 Order to Show Cause at 1. In the administrative law judge's subsequent Order of Dismissal and Remand, he found that claimant received the show cause order on June 18, 2012, as evidenced by the postal receipt, but did not respond. July 11, 2012 Order of Dismissal and Remand. The administrative law judge further noted that claimant was not receiving interim benefits pursuant to an award by the district director. *Id.* Accordingly, the administrative law judge dismissed the claim and remanded it to the district director for appropriate action. *Id.*

The regulations provide that an administrative law judge may dismiss a claim “[u]pon the failure of the claimant or his or her representative, to attend a hearing without good cause,” or “[u]pon the failure of the claimant to comply with a lawful order of the administrative law judge.” 20 C.F.R. §725.465(a)(1), (2); *see Clevinger v. Regina Fuel Co.*, 8 BLR 1-1 (1985). In a claim in which payments have been made pursuant to a district director’s award of interim benefits, however, an order of dismissal cannot be entered “except upon the motion or written agreement of the Director.” 20 C.F.R. §725.465(d). In the present case, because claimant: failed to appear at either the scheduled physical examination or the hearing; did not respond to the Order to Show Cause; and was not receiving interim benefits, the administrative law judge acted within his discretion in dismissing the claim under 20 C.F.R. §725.465. *See Clark*, 12 BLR at 1-153. The administrative law judge further complied with the requirements of 20 C.F.R. §725.466(a) by serving the Order of Dismissal and Remand on all of the parties to the claim.

Accordingly, the administrative law judge’s Order of Dismissal and Remand is affirmed.

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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JUDITH S. BOGGS  
Administrative Appeals Judge