

BRB No. 05-0558 BLA

ARLIE WOODS)
)
 Claimant-Petitioner)
)
 v.)
)
 LEECO, INCORPORATED) DATE ISSUED: 12/20/2005
)
 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 the Order Denying Motion for Reconsideration of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Order of Dismissal and Order Denying Motion for Reconsideration (2003-BLA-06382) of Administrative Law Judge Rudolf L. Jansen dismissing 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). The administrative law judge issued the Order of Dismissal on February 28, 2005, after claimant failed to respond to the administrative law judge's Order to Show Cause issued on January 20, 2005, directing claimant to show cause why employer's motion to dismiss pursuant to 20 C.F.R. §725.465(a)(1) should not be granted because of the failure of claimant, or any representative acting on his behalf, to attend the hearing scheduled on

January 12, 2005. The administrative law judge subsequently denied claimant's motion for reconsideration in an Order issued on March 14, 2005.

On appeal, claimant contends that the administrative law judge erred in dismissing his claim. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has declined to file a response in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Orders must be affirmed if they are rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The regulations provide that an administrative law judge may dismiss a claim upon the failure of claimant or his representative to attend a hearing without good cause. 20 C.F.R. §725.465(a)(1); *see generally Clevinger v. Regina Fuel Co.*, 8 BLR 1-1 (1985). Prior to issuance of an Order of Dismissal pursuant to 20 C.F.R. §725.466, the administrative law judge must issue an order to show cause why the claim should not be dismissed and afford all parties a reasonable time to respond to such order. 20 C.F.R. §725.465(c). In the present case, the administrative law judge found that claimant failed to appear at the scheduled hearing and failed to respond on or before February 7, 2005, as directed in the Order to Show Cause issued on January 20, 2005. Consequently, the administrative law judge acted within his discretion in dismissing the claim pursuant to Sections 725.465(c) and 725.466.

On appeal, claimant's counsel asserts that an associate had agreed to request continuances of four cases scheduled for hearing on January 12, 2005, including claimant's, because counsel was hospitalized from December 17, 2004 through the end of January 2005, and no attorney from his office was available to attend the hearings; however, while continuances were obtained without objection for the other clients, "there was apparently a misunderstanding" in claimant's case. Counsel additionally maintains that the Order to Show Cause and the Order of Dismissal were not served on his office, which compounded the "confusion" in this case. Counsel thus argues that dismissal was not appropriate, as claimant pursued his claim with due diligence; the dismissal was not claimant's fault, as counsel's office informed him that a continuance of the hearing had been granted; and there was no intent to inconvenience any other party in this case. Claimant's Brief at 2-4. These arguments are without merit.

In denying claimant's motion for reconsideration, the administrative law judge noted that because claimant was not represented by counsel at the time the notice of hearing was mailed, a *pro se* letter was directed to claimant, advising him of his right to retain an attorney at no cost to himself, and urging claimant to promptly seek an attorney

to represent him at the scheduled hearing.¹ The administrative law judge determined, however, that the record does not reflect that any attorney ever entered an appearance in the case after claimant's original counsel withdrew from representing claimant, and since there was no attorney of record, counsel was not served with the Order to Show Cause or the Order of Dismissal.² The administrative law judge found that claimant had an obligation to appear at the hearing or request a continuance; because claimant failed to do either and also failed to respond to the Order to Show Cause, the administrative law judge concluded, within a proper exercise of his discretion, that a dismissal of his claim was warranted pursuant to Section 725.465(c). Order Denying Motion for Reconsideration at 1-2.

¹ The administrative law judge requested that claimant notify him by return mail as to whether claimant would have someone representing him at the hearing; claimant was instructed to indicate his intention on a form enclosed with the *pro se* letter, and return the form to the administrative law judge in the postage-paid envelope provided. Administrative Law Judge's Exhibit 3. The record reflects no response from claimant or his representative.

² Counsel maintains that he submitted a signed Form CM-1078 to the Department of Labor (DOL) in Pikeville, but because the case had been transferred to the Office of Administrative Law Judges (OALJ), DOL returned the form to him on November 1, 2004. Counsel asserts that DOL forwarded a copy of the form to the Office of the Solicitor in Nashville, the Hearing and Appeal Section in Washington, and the OALJ in Washington; however, the record contains no documentation to support this assertion, nor does counsel explain why he failed to file the form with the OALJ when he admits that claimant presented the Notice of Hearing when he retained counsel. *See* Claimant's Brief at 2. Moreover, although counsel maintains that his office informed claimant that a continuance of the hearing had been requested and granted, counsel fails to explain why no response was made to the Order to Show Cause after claimant notified his office that such an order had been issued. *See* Claimant's Brief at 3.

Accordingly, the Order of Dismissal and the Order Denying Motion for Reconsideration of the administrative law judge dismissing the claim are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge