

BRB No. 10-0311 BLA

BOBBY D. SLONE )  
 )  
 Claimant-Petitioner )  
 )  
 v. )  
 )  
 BRANHAM & BAKER UNDERGROUND )  
 CORPORATION )  
 )  
 and ) DATE ISSUED: 01/20/2011  
 )  
 GENERAL RECOVERY, INCORPORATED )  
 )  
 Employer/Carrier- )  
 Respondents )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Party-in-Interest )  
 ) DECISION and ORDER

Appeal of the Order of Dismissal of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Bobby D. Slone, Betsy Layne, Kentucky, *pro se*.

Paul E. Jones (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Order of Dismissal (2006-BLA-05151) of Administrative Law Judge Daniel F. Solomon rendered on a subsequent

claim, filed on January 27, 2005,<sup>1</sup> pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), amended by Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010)(to be codified at 30 U.S.C. §§921(c)(4) and 932(l))(the Act). On August 19, 2005, the district director issued a Proposed Decision and Order awarding benefits. Director's Exhibit 28. The Black Lung Disability Trust Fund (the Trust Fund) began making payments to claimant, commencing September 2005. Director's Exhibit 32. At employer's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing. A hearing was first scheduled for December 3, 2008, before Administrative Law Judge Larry S. Merck, but claimant failed to appear. On December 5, 2008, Judge Merck issued an Order to Show Cause why the claim should not be dismissed based on claimant's failure to attend the scheduled hearing. Claimant did not respond to that Order and Judge Merck dismissed the claim on December 23, 2008.

On January 20, 2009, the Director, Office of Workers' Compensation Programs (the Director), filed a Motion for Reconsideration requesting that the Order of Dismissal be vacated, pursuant to 20 C.F.R. §§725.465(d), 725.522, and the case be reset for a hearing, as claimant was receiving benefit payments from the Trust Fund and the Director did not agree to dismissal of the claim. The Director's motion was granted and the case was later assigned to Administrative Law Judge Daniel F. Solomon (the administrative law judge) for a hearing, scheduled for November 18, 2009, in Pikeville, Kentucky. Director's Exhibit 29. Claimant again failed to appear at the hearing, although counsel for claimant and employer appeared. Claimant's counsel advised that he was not in contact with claimant and agreed with the administrative law judge that a show cause order should be issued. Employer's counsel indicated that claimant had also failed to appear for several scheduled medical examinations.

On November 23, 2009, the administrative law judge issued an Order directing claimant to show cause why his claim should not be dismissed for failure to appear at the scheduled hearing. The administrative law judge specifically instructed the Director to respond to the Order to Show Cause, pursuant to 20 C.F.R. §725.465(d). Neither claimant nor the Director responded to the administrative law judge's Order. Consequently, on December 29, 2009, the administrative law judge dismissed the claim pursuant to 20 C.F.R. §725.465(a).

On appeal, claimant indicates that he did not attend the hearing "because I was living in Mississippi at the time and could not drive back to Kentucky because I was

---

<sup>1</sup> Claimant filed an initial claim on April 4, 2002, which was denied by the district director on June 16, 2003, because the evidence did not establish any of the requisite elements of entitlement. Director's Exhibit 1. Claimant took no action with regard to the denial until he filed this subsequent claim.

sick.” Claimant’s January 12, 2010 appeal letter. Employer responds to claimant’s appeal, urging affirmance of the administrative law judge’s Order of Dismissal. The Director has declined to file a brief unless requested to do so by the Board.

In an appeal filed by a claimant without the assistance of counsel, the Board considers 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); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). The Board 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 applicable 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 Board reviews the administrative law judge’s procedural rulings for abuse of discretion. *Clark v. Karst-Robbins Coal Co.* 12 BLR 1-149, 1-153 (1989) (*en banc*).

Based on our review of the facts of this case and the pertinent regulatory provisions, we conclude that the administrative law judge erred in dismissing this claim. In accordance with 20 C.F.R. §725.465, an administrative law judge has the authority to dismiss a claim under certain circumstances. The regulations at 20 C.F.R. §725.465 state, in pertinent part, that:

(a) The administrative law judge may, at the request of any party, or on his or her own motion, dismiss a claim:

(1) Upon the failure of the claimant or his or her representative to attend a hearing without good cause;

(2) Upon the failure of the claimant to comply with a lawful order of the administrative law judge . . . .

20 C.F.R. §725.465(a). The regulation, however, also specifically provides that:

No 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 20 C.F.R. §725.522, *except upon the motion or written agreement of the Director.*

20 C.F.R. §725.465(d) (emphasis added).<sup>2</sup>

---

<sup>2</sup> The regulations at 20 C.F.R. §725.522 provide, in part, that:

(a) If an operator . . . refuses to commence the payment of benefits within [thirty] days of issuance on an initial

In this case, the record establishes that the Trust Fund was making interim benefit payments to claimant, pursuant to an award of benefits issued by the district director on August 19, 2005. Director's Exhibits 28, 32. Although the Director did not respond to the administrative law judge's Order to Show Cause, we conclude that, based on the requirements of 20 C.F.R. §725.465(d), the administrative law judge was without authority to issue his Order of Dismissal, in the absence of either a motion by the Director requesting dismissal of the claim, or the Director's written agreement that the claim should be dismissed.

Accordingly, the administrative law judge's Order of Dismissal is vacated, and the case is remanded to the administrative law judge for further consideration.

---

determination of eligibility by the district director . . . the fund shall commence the payment of such benefits and shall continue such payments as appropriate.

(b) If benefit payments are commenced prior to the final adjudication of the claim and it is later determined by an administrative law judge, the Board, or court that the claimant was ineligible to receive such payments, such payments shall be considered overpayments pursuant to [20 C.F.R.] §725.540 and may be recovered in accordance with the provisions of this subpart.

20 C.F.R. §725.522(a), (b).

SO ORDERED.

---

NANCY S. DOLDER, Chief  
Administrative Appeals Judge

---

BETTY JEAN HALL  
Administrative Appeals Judge

---

JUDITH S. BOGGS  
Administrative Appeals Judge