

BRB No. 03-0127 BLA

MANILA M. YOKUM)
)
 Claimant-Petitioner)
)
 v.) DATE ISSUED:
)
 ISLAND CREEK COAL COMPANY)
)
 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 of Robert J. Lesnick, Administrative Law Judge, United States Department of Labor.

Manila M. Yokum, Mill Creek, West Virginia, *pro se*.

Ashley M. Harman and William S. Mattingly (Jackson and Kelly, PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals, without the aid of legal counsel, the Order of Dismissal (01-BLA-0137) of Administrative Law Judge Robert J. Lesnick 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).¹ Applying the regulations at 20 C.F.R. Part 725, the administrative law judge dismissed this case pursuant to 20

¹ The 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 20 C.F.R. Parts 718, 722, 725 and 726 (2002).

C.F.R. §725.465(a)(1), (a)(2) (2000) because claimant failed to show good cause as to why she did not attend the scheduled hearing on August 2, 2002, after being directly ordered to do so. Order of Dismissal at 1-2. On appeal, claimant generally asserts that the administrative law judge erred in failing to find good cause for claimant's absence at the hearing. Employer responds, urging that the Order of Dismissal of this claim be affirmed. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has not responded to this appeal.

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. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, are supported by substantial evidence, and are in accordance with 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 standard of review for the Board in analyzing an appellant's arguments on appeal of an Order of Dismissal is whether the dismissal is arbitrary, capricious or an abuse of discretion. See *Clevinger v. Regina Fuel Co.*, 8 BLR 1-1 (1985).

Claimant filed a survivor's claim on July 22, 1999, Director's Exhibit 1, which the district director denied on January 3, 2000. Director's Exhibit 7. Subsequently, on January 7, 2000, claimant submitted additional medical evidence and requested modification of her denied claim, Director's Exhibit 8, which the district director denied on August 30, 2000. Director's Exhibit 35. Claimant ultimately requested a formal hearing before an administrative law judge, Director's Exhibit 36, and the case was transferred to the Office of Administrative Law Judges. Director's Exhibit 39. A Notice of Hearing was mailed to claimant on February 6, 2001, informing her that a hearing was scheduled on her claim on June 13, 2001. By Order dated February 20, 2001, the administrative law judge, referencing a lawsuit filed in the United States District Court for the District of Columbia challenging the amendments to 20 C.F.R. Parts 718 and 725 of the regulations, issued an Order instructing the parties to submit briefs regarding whether application of the amended regulations would affect the outcome of the case.

On April 6, 2002, the administrative law judge issued an Order Rescheduling Hearing to 11:00 a.m. on July 12, 2001, in Morgantown, West Virginia. At the scheduled time and place of the hearing on July 12, 2001, neither claimant, nor anyone representing claimant, appeared. The administrative law judge then issued an Order to Show Cause on July 17, 2001, requesting that claimant show cause on

or before July 31, 2001, why her claim should not be dismissed for her failure to appear at the scheduled hearing. See 20 C.F.R. §725.465 (2000). By letter dated July 18, 2001, claimant responded to the Order to Show Cause and requested a continuance in order to attempt to obtain legal counsel. On July 24, 2001, the administrative law judge issued an Order of Continuance granting claimant's request for a continuance. On September 18, 2001, the administrative law judge issued a Notice of Hearing to take place at 10:50 a.m. on February 20, 2002, in Weston, West Virginia. On February 14, 2002, employer forwarded a letter, via facsimile, wherein claimant requested a continuance of the scheduled hearing. On February 15, 2002, the administrative law judge issued an Order of Continuance granting claimant's request for a continuance.

On April 25, 2002, the administrative law judge issued a Notice of Hearing to take place at 1:00 p.m. on August 2, 2002, in Morgantown, West Virginia. On June 26, 2002, the administrative law judge issued a revised Notice of Hearing rescheduling the hearing for 1:00 p.m. on August 1, 2002, in Morgantown, West Virginia. At the scheduled time and place of the hearing on August 1, 2002, neither claimant, nor anyone representing claimant, appeared. At the hearing, employer requested dismissal of the case or, at least, that the administrative law judge issue a show-cause order for claimant's failure to appear. Hearing Transcript at 5. Employer also noted that it would not be opposed to a decision on the record.

The administrative law judge issued an Order to Show Cause on August 6, 2002, requesting that claimant show cause on or before August 20, 2002, why her claim should not be dismissed for her failure to appear at the scheduled hearing. By letter dated August 19, 2002, claimant responded to the Order to Show Cause and, while failing to address the issue of why she failed to appear at the scheduled hearing, indicated that she was unable to obtain legal counsel and requested a continuance. Subsequently, on September 20, 2002, the administrative law judge issued an Order of Dismissal, the subject of the instant appeal.

In his Order of Dismissal, the administrative law judge stated that claimant responded to his Order to Show Cause by expressing frustration with the process of pursuing her claim, but failed to explain her failure to appear at the hearing. Order of Dismissal at 2. The administrative law judge also stated that claimant would not agree to a decision based on the record even though employer had agreed to a decision on the record. *Id.* Therefore, the administrative law judge dismissed this case because claimant did not show good cause for her 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). *Id.*

On appeal, claimant does not provide any explanation for her failure to appear at the hearing and/or to substantively respond to the administrative law judge's Order to Show Cause, but merely generally addresses whether the evidence of record is sufficient to establish entitlement. Section 725.465 (2000) provides in pertinent part:

(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 . . .

20 C.F.R. §725.465 (2000).

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).

The administrative law judge provided claimant an opportunity and a reasonable time to establish good cause for her failure to attend the hearing in this case by issuing an Order to Show Cause. See 20 C.F.R. §725.465(c) (2000). Although employer agreed that a decision could be based on the record, claimant did not waive her 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;² *Churpak v. Director, OWCP*, 9 BLR 1-71 (1986); see generally *Pukas v. Schuylkill Contracting Co.*, 22 BLR 1-69 (2000). Claimant failed to comply with the administrative law judge's June 26, 2002, order to appear at the hearing scheduled on August 1, 2002, and failed to show good cause as to why she did not attend the hearing. Therefore, we hold that the administrative law judge did not abuse his discretion in determining that claimant did not demonstrate good cause for failing to appear at the scheduled hearing. 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). Consequently, we hold that the administrative law judge's decision to

² In the amended regulations, 20 C.F.R. §725.461 has not been revised.

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*, 8 BLR at 1-2; *cf. Howell v. Director, OWCP*, 7 BLR 1-259 (1984).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge