

BRB No. 05-0227 BLA

JAMES D. DEBAKER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EIGHTY-FOUR MINING COMPANY	)	
	)	DATE ISSUED: 06/14/2005
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Order Dismissing Claim of Michael P. Lesniak,  
Administrative Law Judge, United States Department of Labor.

James A. Marchewka, Canonsburg, Pennsylvania, for claimant.

Before: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order Dismissing Claim (04-BLA-6061) of Administrative Law Judge Michael P. Lesniak rendered on 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 dismissed the claim after claimant failed to comply with an order compelling him to respond to discovery requests and did not respond to an order to show cause.

On appeal, claimant argues that his claim should be decided on its merits. Both employer and the Director, Office of Workers' Compensation Programs have indicated that they will not file substantive responses to claimant's appeal unless requested to do so by the Board.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is 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’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant’s application for benefits filed on March 20, 2003 was denied by the district director and claimant requested a hearing. Director’s Exhibits 2, 27, 29. On August 17, 2004, employer moved the administrative law judge to compel claimant to sign a medical authorization and respond to interrogatories, or alternatively, to dismiss the claim because claimant had failed to cooperate with employer in the development of its evidence. On September 3, 2004, the administrative law judge issued an Order Compelling Claimant To Comply With Discovery Requests. The administrative law judge ordered claimant to respond to employer’s interrogatories and authorize access to his medical records by September 23, 2004. In the order, the administrative law judge advised claimant that “failure to respond to this Order may result in dismissal of this claim for benefits.” Order Compelling Claimant to Comply With Discovery Requests at 2 (Sep. 3, 2004).

On September 23, 2004, employer renewed its motion to dismiss the claim because claimant had not complied with the administrative law judge’s discovery order. On September 27, 2004, the administrative law judge issued an order directing claimant to show cause, by October 12, 2004, why employer’s motion to dismiss should not be granted. The administrative law judge “warned [claimant] that failure to respond to this Order may result in dismissal of this claim for benefits.” Order to Show Cause at 1 (Sep. 27, 2004).

Claimant failed to respond to the administrative law judge’s Order to Show Cause. Consequently, on October 18, 2004, the administrative law judge issued his Order Dismissing Claim. He dismissed the claim pursuant to 20 C.F.R. §725.465(a)(2) because claimant failed to comply with a lawful order of the administrative law judge. Order Dismissing Claim at 2 (Oct. 18, 2004).

On appeal, claimant acknowledges that he did not comply with the administrative law judge’s orders. Claimant argues, however, that “the Board should reopen” his claim because he would be prejudiced by not having the claim decided on its merits. Claimant’s Brief at 4. Claimant states that he “was unrepresented at the time of notice and was unclear of the meaning of the Orders,” but has since retained counsel and wishes to pursue his claim. Petition for Review at 2.

Under the regulation governing dismissals for cause, “[t]he administrative law judge may, at the request of any party . . . dismiss a claim . . . [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)(2). The Board reviews an administrative law judge’s decision to dismiss a

claim under an abuse of discretion standard. *See Clevinger v. Regina Fuel Co.*, 8 BLR 1-1, 1-2 (1985).

Under the facts of this case, the administrative law judge did not abuse his discretion in dismissing the claim. *Clevinger*, 8 BLR at 1-2. Claimant failed to comply with the administrative law judge's order to answer employer's interrogatories and sign a medical authorization granting employer access to his medical records.<sup>1</sup> A miner may not unreasonably refuse to provide these items, 20 C.F.R. §725.414(a)(3)(i)(A), and the administrative law judge had the authority to order claimant to provide them. 20 C.F.R. §725.351(b); 29 C.F.R. §18.29(a). Upon claimant's failure to comply with the Order Compelling Claimant to Comply With Discovery Requests, the administrative law judge properly issued an Order to Show Cause as to why the claim should not be dismissed, and provided claimant a reasonable time to respond. 20 C.F.R. §725.465(c). When claimant did not respond to the Order to Show Cause, the administrative law judge acted within his discretion in dismissing the claim pursuant to 20 C.F.R. §725.465(a)(2). We therefore affirm the administrative law judge's order dismissing the claim.<sup>2</sup>

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<sup>1</sup> Employer informed the administrative law judge that it sought these items so that it could determine whether to have claimant examined by a physician of its choosing. Order Compelling Claimant to Comply With Discovery Requests at 1-2 (Sep. 3, 2004); Motion to Dismiss at 2 (Aug. 18, 2004); Employer's Letter (Sep. 23, 2004).

<sup>2</sup> Claimant requests that the Board reopen his dismissed claim. To the extent claimant intends to request modification pursuant to 20 C.F.R. §725.310, we note that all requests for modification must be filed with the district director. *Hoskins v. Director, OWCP*, 11 BLR 1-144, 1-145 (1988).

Accordingly, the administrative law judge's Order Dismissing Claim is affirmed.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge