

BRB No. 02-0578 BLA

EMMETT R. LAMBERT)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
HONEYWELL INTERNATIONAL)	DATE ISSUED:
INCORPORATED)	
)	
and)	
)	
ALLIED-SIG)	
INSURANCE FUND)	
)	
Employer/Carrier-)	
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 Robert J. Lesnick, Administrative Law Judge, United States Department of Labor.

Emmett Lambert, Shrewsbury, West Virginia, *pro se*.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Order Dismissing Claim (01-BLA-0329) of Administrative Law Judge Robert J. Lesnick 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).¹ Concluding that claimant failed to demonstrate good cause

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

for his failure to appear at the formal hearing scheduled for this case on February 28, 2002, the administrative law judge dismissed the claim.²

on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

² The procedural history of this case is as follows: claimant initially filed a claim on May 14, 1979, which was denied by Administrative Law Judge David A. Sarno in a Decision and Order issued on June 25, 1986, Director's Exhibit 53; subsequent to an appeal filed by claimant, the Board affirmed the denial of benefits, *Lambert v. Allied Chemical Corp.*, BRB No. 86-1743 (June 30, 1988)(unpub.); claimant filed a second claim on November 9, 1993; after benefits were denied by Administrative Law Judge Edward T. Miller on March 8, 1996, Director's Exhibit 54, the Board affirmed the denial of benefits, *Lambert v. Allied, Signal, Inc.*, BRB No. 96-0697 BLA (Mar. 20, 1997)(unpub.); in a subsequent order, the Board summarily rejected claimant's Motion for Reconsideration, *Lambert v. Allied, Signal, Inc.*, BRB No. 96-0697 BLA (Order on Motion for Reconsideration)(May 29, 1997)(unpub.); on June 1, 1998, claimant filed the instant claim, Director's Exhibit 1, which was deemed to be a request for modification; on September 22, 2000, the district director issued a Proposed Decision and Order denying the claim on the basis of claimant's failure to establish a change in conditions or mistake in the determination of fact, Director's Exhibit 49; claimant

On appeal, claimant contends that his claim should not have been dismissed and that he is entitled to benefits. Neither employer, nor the Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has filed a brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *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, supported by substantial evidence, and in accordance with 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).

On March 28, 2001, a Notice of Hearing was issued setting the hearing date for this case on August 15, 2001. Claimant was informed of his right to counsel and the procedure for submitting evidence and was further informed that, if benefits were awarded, attorney fees would be paid by the Trust Fund or the employer, and if benefits were denied, he would not be required to pay attorney fees. Claimant was also informed that “[u]nexcused failure of a party to appear may result in issuance of an order to show cause why such party’s interest should not be dismissed.” Notice of Hearing dated March 28, 2001 at 2. By Order of Continuance dated July 25, 2001, claimant was notified that the hearing scheduled for August 15, 2001 was canceled and would be rescheduled at a later date. By Notice and Order dated October 4, 2001, claimant was notified by the administrative law judge that the hearing was being re-scheduled for February 28, 2002. Claimant was again informed of his right to counsel and the procedure for submitting evidence. In addition, the following language was contained in the Notice:

Claimants must appear at the hearing even if they are not represented by attorneys. Unexcused failure of a party to appear may result in issuance of an order to show cause why such party’s interest should not be dismissed.

subsequently requested a hearing before an administrative law judge; after claimant’s failure to attend the scheduled hearing on this claim and failure to establish good cause for not attending the hearing, the administrative law judge dismissed the claim. It is from this dismissal that claimant now appeals.

Notice of Hearing dated October 4, 2001. On December 18, 2001, the Department of Labor received a form from claimant indicating that he did not have an attorney and would represent himself at the hearing. By notice dated January 18, 2002, claimant was advised by the administrative law judge of a room change for the hearing, but that the hearing remained scheduled for February 28, 2002. The hearing was held February 28, 2002. Neither claimant nor a representative for claimant appeared at the hearing. *See* Hearing Transcript at 3. Employer moved that the case be dismissed or that the administrative law judge issue an order for claimant to show cause as to why he did not appear. The administrative law judge agreed to issue a Show Cause Order and if no good cause was shown to dismiss the case. Hearing Transcript at 4. On March 18, 2002, the administrative law judge issued an Order to Show Cause giving claimant until April 2, 2002 to show cause in writing why he or his representative failed to appear at the hearing. The administrative law judge stated that a failure to respond by that date would lead to an order dismissing the claim. By letter to the administrative law judge dated “March 5, 2006” [sic] claimant inquired as to when he could expect a decision on his claim. In a letter to the administrative law judge dated “March 8, 2006” [sic] claimant responded to the show cause order by submitting records from Dr. Rasmussen and “Joyce Chandler with the Labor Board”, purporting to show that claimant was totally disabled from black lung.³ Claimant further stated that due to bad knees he was able to walk only a short distance with a walker. The administrative law judge found that claimant submitted another letter dated March 21, 2002, making allegations regarding an attorney and unnamed judges, but not offering any explanation for claimant’s absence at the hearing scheduled for February 28, 2002. Order of Dismissal at 2. The administrative law judge thus concluded that claimant failed to establish good cause for his failure to appear at the February 28, 2002 hearing. Accordingly, the administrative law judge dismissed the claim.

The unexcused failure of a party to attend a hearing constitutes a waiver of the right to present evidence and may result in a dismissal of the claim. 20 C.F.R. §725.461(b) and 20 C.F.R. §725.465 (2000). Dismissal is proper where claimant or his representative fails to appear at the hearing absent a showing of good cause. 20 C.F.R. §725.461(b); *Prater v. Clinchfield Coal Co.*, 12 BLR 1-121 (1989); *Clevinger v. Regina Fuel Co.*, 8 BLR 1-1 (1985); *see Howell v. Director, OWCP*, 7 BLR 1-259 (1984); *Robertson v. Director, OWCP*, 1 BLR 1-932 (1978). Here, the administrative law judge concluded, based on the correspondence from claimant that he had reviewed, that claimant failed to demonstrate good cause for his failure to appear at the hearing and dismissed the claim.

³ The record shows that Joyce Chandler is a claims examiner with the United States Department of Labor, but does not show that she found claimant to be totally disabled. *See* Director’s Exhibit 32.

The record, however, contains a letter from claimant dated March 22, 2002, in which he states that he was not able to attend the hearing on February 28, 2002 because of lung problems and because he was unable to walk from the parking garage because of two bad knees, was house bound, and was unable to walk twenty feet with the aid of his walker. Claimant also states that he is eighty-four years old and cannot travel because of his legs. The letter, postmarked March 22, 2002, was addressed to a Department of Labor office in Washington, D.C., and was stamped as received on April 2, 2002. The letter was subsequently forwarded to a Department of Labor office in Charleston, West Virginia where it was stamped as received on May 2, 2002. Apparently, this letter was not part of the record before the administrative law judge when he issued his Order of Dismissal, hence, we conclude that remand of the case is necessary for the administrative law judge to determine whether claimant has provided good cause for his failure to attend the hearing. 20 C.F.R. §725.461(b); 20 C.F.R. §18.5(d)(1); *Howell, supra*; *Robinson, supra*; *see generally Pukas v. Schuylkill Contracting Co.*, 22 BLR 1-69 (2000).

Accordingly, the administrative law judge's Order Dismissing Claim is vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge