

BRB No. 02-0612

TOM OLSEN)
)
 Claimant-Petitioner)
)
 v.)
)
 TRIPLE A MACHINE SHOP,)
 INCORPORATED)
) DATE ISSUED: JUN 4, 2003
 Self-Insured)
 Employer-Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS,)
 UNITED STATES DEPARTMENT)
 OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Order Suspending Proceeding Until Such Time as the Claimant Obtains Representation from a Licensed Attorney of Paul A. Mapes, Administrative Law Judge, United States Department of Labor.

Tom Olsen, Albuquerque, New Mexico, *pro se*.

Robert E. Babcock, Sherwood, Oregon, for self-insured employer.

Peter B. Silvain, Jr. (Howard M Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Mark Flynn, Acting Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Order Suspending Proceeding Until Such Time as the Claimant Obtains Representation from a Licensed Attorney (2001-LHC-1500) of Administrative Law Judge Paul A. Mapes rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sustained a work-related injury in 1978. In 1982, Administrative Law Judge Halpern awarded claimant permanent total disability benefits as a result of the 1978 injury to his right ankle. Employer obtained relief from payment of compensation pursuant to Section 8(f), 33 U.S.C. §908(f). In 1986, claimant's entitlement to medical benefits was resolved via Section 8(i), 33 U.S.C. §908(i), settlement. See *Olsen v. Triple A Machine Shop, Inc.*, 25 BRBS 40 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, 996 F.2d 1226 (9th Cir. 1993). In 1999, employer filed a motion for modification pursuant to Section 22, 33 U.S.C. §922, alleging that claimant's condition changed from total to partial and that he is employable. The Office of Administrative Law Judges (OALJ) assigned this claim number 2000-LHC-1504 (hereinafter #1504).¹ In late 2000, claimant filed a claim alleging injury due to exposure to toxic substances while at employer's facility, and he challenged the validity and scope of the 1986 settlement. These combined claims were assigned number 2001-LHC-1500 (hereinafter #1500). Claims #1504 and #1500 have not been consolidated, and no hearing has been held in either case. Although several delays were due to claimant's alleged medical condition,² other delays have been caused by claimant's filing numerous motions, seeking, among other things, summary judgment, an expedited hearing, the appointment of a medical doctor, recusal of the administrative law judge, sanctions against employer, a stay of proceedings, a protective order, removal from the calendar, and expansion of the scope of the hearing. The administrative law judge denied all of these

¹In response, claimant filed a claim for benefits, 2000-LHC-2237, alleging that employer's motion caused additional stress-related problems. Claimant later moved for voluntary dismissal of this claim.

²The hearing for #1504 was first postponed by claimant's request for accommodation – he alleged he is bed-ridden and cannot attend a hearing at the courthouse. The administrative law judge made the necessary accommodations by scheduling a hearing at claimant's home or at a place that could provide live video feed to claimant's home. The second and third postponements were apparently due to claimant's having been hospitalized. According to claimant's pleadings, he has been hospitalized a number of times and has resided in a hospice due to the severity of his condition.

requests. Only case #1500 is before us, and the following is a synopsis of the recent activity relevant to the current appeal.

On October 19, 2001, the administrative law judge issued an Order to Show Cause Why This Proceeding Should Not Be Suspended Until Such Time As The Claimant Obtains Representation From A Licensed Attorney. In that order, the administrative law judge presented the procedural history of the case, including a thorough description of the motions and orders filed, noted warnings he gave claimant to refrain from continued “misrepresentations and dilatory tactics,” including the filing of frivolous complaints, the making of false representations, and the failure to follow orders and submit documents, and he observed that, despite all the warnings, claimant’s behavior did not change. Order at 4-14. Thus, the administrative law judge directed claimant to show why all further proceedings in case #1500 should not be suspended until he obtains a licensed legal representative.

On October 29, 2001, the administrative law judge sought the opinion of the Director, Office of Workers’ Compensation Programs (the Director), regarding the authority of administrative law judges to issue sanctions. The Director stated that claimant’s infractions fall within the purview of Section 27(b) of the Act, 33 U.S.C. §927(b), and that the administrative law judge must certify the facts to the district court, which is authorized to issue appropriate sanctions. Order to Suspend at 3-4. On January 9, 2002, the administrative law judge issued an Order Concerning Proposed Imposition of Sanctions.³ Therein, the administrative law judge ordered claimant to sign medical releases, highlighted new misrepresentations and unjustified assertions made by claimant, and stated that claimant’s medical condition is the only possible valid reason for not imposing sanctions. Order at 7-8. The administrative law judge also questioned claimant’s ability to continue representing himself, and he rejected claimant’s assertion that he has a constitutional right to represent himself. Order at 9 n.5 (citing *Iannaccone v. Law*, 142 F.3d 553, 556 (2^d Cir. 1998)). After addressing each party’s contentions, the administrative law judge concluded that if sanctions are to be imposed they must be imposed by the district court, and he sought to commence the certification process, leaving it for employer and the Director to decide which of them would assume the responsibility. Order at 6-12.⁴

Thereafter, the administrative law judge determined that he has the authority to issue *civil* sanctions against a disruptive party. Consequently, on April 9, 2002, he

³The Board dismissed claimant’s appeal of this interlocutory order. BRB No. 02-355 (Feb. 28, 2002).

⁴In response to employer’s assertion that claimant had not complied with the January 9, 2002 Order, on March 8, 2002, the administrative law judge issued a Second Order to Produce Authorizations to Disclose Medical Records. Claimant did not comply with this Order either.

issued an Order to Show Cause Why It Should Not Be Decided That Administrative Law Judges Have Authority to Impose Civil Sanctions in Longshore and Harbor Workers' Compensation Act Proceedings. In this order, the administrative law judge reviewed the history of this case and discussed his interpretation of Section 27(b). Specifically, the administrative law judge provided five reasons for concluding he has the authority to issue a civil sanction.⁵ Order at 4-8.

⁵Those reasons are: 1) Section 27(b) is limited in scope to those actions that “are so disrespectful of the judicial process that they constitute contempt of court[;]” 2) in contempt cases, district courts are limited to either imprisoning or fining the offender, so there is no conflict between Section 27(b) and the OALJ Rules at 29 C.F.R. Part 18; 3) the Board, as affirmed by the United States Court of Appeals for the D.C. Circuit, see n. 13, *infra*, has long-held that the OALJ has the authority to dismiss a claim because of the claimant’s abuses of the administrative process and to depart from that position would be inconsistent with Section 18.29(b), 29 C.F.R. §18.29(b), that an administrative law judge “may” invoke the certification process; 4) in analogous situations in federal courts, statutes nearly identical to Section 27(b) are not interpreted as precluding a bankruptcy referee or a magistrate judge from imposing civil sanctions; and 5) it would be highly impractical to require an administrative law judge to certify all violations of orders to the district court as this would result in relieving administrative law judges of the power to control the cases before them and it would cause prolonged delays in the resolution of longshore cases. Order at 4-8.

Following the parties' timely responses to the show cause order, on May 20, 2002, the administrative law judge issued the Order Suspending Proceeding Until Such Time As The Claimant Obtains Representation From A Licensed Attorney (hereinafter the Order to Suspend) that is now before us. In the Order to Suspend, the administrative law judge summarized the case history, and he addressed the parties' arguments concerning his sanction-wielding authority, noting that the Director did not address the five reasons set forth in the April 9, 2002, Order. Restating these reasons, he concluded that the Director's interpretation of Section 27(b) is not reasonable and is not entitled to deference. He determined he has the power to issue civil, as opposed to criminal, sanctions for those actions that do not rise to the level of "contempt of court." Order to Suspend at 5-10. Determining that dismissal is not warranted, he denied employer's motion to dismiss. The administrative law judge then addressed and rejected claimant's assertions, and he explained that the sanction is based solely on claimant's behavior in case #1500 and not on his actions in the Tenth Circuit or in case #1504.⁶ Consequently, the administrative law judge suspended the proceedings until such time as claimant obtains licensed legal representation. Order to Suspend at 10-12.

Claimant appeals the administrative law judge's Order to Suspend. Employer responds, urging the Board to hold that the administrative law judge retains the authority to sanction claimant's misconduct. The Director responds, contending that Section 27(b) of the Act provides the only remedy for claimant's refusal to comply with the administrative law judge's orders. In an Order dated October 18, 2002, the Board stated that claimant's appeal is interlocutory but, nevertheless, satisfies the requirements of the collateral order doctrine, and that circumstances make it necessary for the Board to direct the course of the adjudicatory process of this case. BRB No. 02-612 (Oct. 18, 2002). Accordingly, the Board granted claimant's appeal, rejected employer's motion to dismiss the appeal, and denied claimant's motions for *en banc* review, expedited review, and oral argument. *Id.* at 4-5. We now address the merits of the appeal.

Propriety of Requiring Claimant to Obtain Licensed Legal Counsel

Claimant contends the administrative law judge violated his constitutional right to self-representation by suspending the proceedings until he obtains licensed legal representation. While asserting that claimant should be sanctioned for his behavior, employer agrees with claimant that it was improper for the administrative law judge to require claimant to retain counsel. The Director did not address the propriety of the administrative law judge's specific action because he believes Section 27(b) precludes the administrative law judge from issuing any type of sanction.

The administrative law judge rejected claimant's constitutional argument in

⁶The Tenth Circuit summarily denied employer's request for sanctions in January 2002. However, determining it lacked jurisdiction, the Tenth Circuit transferred claimant's cases to the Ninth Circuit in May 2002.

one of his earlier orders. As he correctly stated, claimants in civil cases do not have a constitutional right to self-representation. The constitutional right to self-representation applies only to criminal cases. *Andrews v. Bechtel Power Corp.*, 780 F.2d 124 (1st Cir. 1985); *O'Reilly v. New York Times Co.*, 692 F.2d 863 (2^d Cir. 1982). Civil litigants do, however, have a long-standing statutory right to self-representation. 28 U.S.C. §1654; *Iannaccone*, 142 F.3d at 556-558; *Andrews*, 780 F.2d at 137. Section 1654 states:

In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

Although the courts have acknowledged there are drawbacks to permitting a person to appear *pro se*, such as the lack of legal training and the likelihood the court will be burdened by the “filing [of] illogical or incomprehensible pleadings, affidavits and briefs,” or the use of the courtroom for the advancement of personal social or political agenda, the right still stands. *Iannaccone*, 142 F.3d at 557. While Section 1654 is not applicable to these proceedings, as a hearing before an administrative law judge is not one before a “court of the United States,” see generally *Kalaris v. Donovan*, 697 F.2d 376 (D.C. Cir. 1983), *cert. denied*, 462 U.S. 1119 (1983), we see no reason why a claimant under the Act should not have the right to represent himself. Section 702.131(a) of the Act’s regulations, 20 C.F.R. §701.131(a), states in relevant part, that “claimants . . . may be represented in any proceeding under the Act by an attorney” See also 29 C.F.R. §18.34(g)(3). Although claimant has indicated his willingness to accept free legal assistance from the Secretary of Labor, which is not forthcoming, see *infra*; 33 U.S.C. §939, he has clearly chosen to represent himself in this matter. In light of Section 1654 and the case precedent, we hold that claimant is within his right to act on his own behalf. Thus, the administrative law judge erred in suspending the proceedings until such time as claimant retains a licensed legal representative. The administrative law judge’s frustration with claimant’s pre-trial filings and tactics does not give him the authority to require claimant to hire an attorney.⁷ *Andrews*, 780 F.2d at 137; see also *Faretta v. California*, 422 U.S. 806 (1975); *United States v. Flewitt*, 874 F.2d 669 (9th Cir. 1989). Therefore, we vacate the administrative law judge’s order, and we remand

⁷Employer has filed a motion to supplement the record and for summary affirmance. As a basis for its motion employer attaches a letter from claimant to OWCP in which claimant writes that his physician stated he is “not medically competent to participate in either the current administrative adjudication in my claim 1504 or continue to act as my own attorney in this administrative action.” Employer thus contends that the administrative law judge’s Order to Suspend should be affirmed. We deny employer’s motion. Claimant’s assertion that he can no longer act as his own attorney does not alter our holding that the administrative law judge here cannot require him to obtain counsel or to sanction him in that way.

the case to the administrative law judge.

Applicability of Section 27(b)

Of primary importance to this case is the administrative law judge's determination that Section 27(b) does not apply and that he may issue civil sanctions against a disruptive party so as to maintain control of the administrative process. For the reasons that follow, we hold that if the administrative law judge believes claimant should be sanctioned for his conduct, then sanctions must be issued in accordance with the statutory provisions of Section 27(b).

It is axiomatic that an administrative law judge has the authority to conduct a fair and impartial hearing which includes, but is not limited to, the power to: administer oaths, examine witnesses, compel the production of documents, compel appearances, issue decisions and orders, and take any actions authorized by the Administrative Procedure Act and, where appropriate, the Federal Rules of Civil Procedure (FRCP), and "[d]o all other things necessary to enable him or her to discharge the duties of the office." 29 C.F.R. §18.29(a); see *also* 5 U.S.C. §556; 33 U.S.C. §§923, 927(a); 20 C.F.R. §702.331 *et seq.* Section 18.36 of the OALJ Rules, 29 C.F.R. §18.36, requires persons appearing before administrative law judges to act ethically and with integrity, and it gives the administrative law judges the authority to: "exclude parties, participants, and their representatives for refusal to comply with directions, continued use of dilatory tactics, refusal to adhere to reasonable standards of orderly and ethical conduct, [and] failure to act in good faith. . . ." 29 C.F.R. §18.36(b); see *Baroumes v. Eagle Marine Services*, 23 BRBS 80 (1989). In reliance on this rule, and in conjunction with Section 18.29(a)(9), 29 C.F.R. §18.29(a)(9), the administrative law judge suspended the proceedings until claimant hires an attorney, thereby effectively excluding claimant from being his own representative. However, the OALJ Rules, which apply to proceedings before the OALJ, do not apply "[t]o the extent that [they] may be inconsistent with a rule of special application as provided by statute. . . ." 29 C.F.R. §18.1(a); *Goicochea v. Wards Cove Packing Co.*, ___ BRBS ___, BRB No. 02-0439, slip op. at 6 n.3 (March 13, 2003). Section 27(b), as the Director correctly asserts, is such a rule of "special application" and is applicable to this case as the exclusive remedy to sanction claimant's misconduct, as claimant's actions in this case fall within the behavior prohibited in the first clause of that section. *Goicochea*, slip op. at 4-6.

Section 27(b) states in pertinent part:

If any person in proceedings before a deputy commissioner or Board disobeys or resists any lawful order or process, or misbehaves during a hearing or so near the place thereof as to obstruct the same, or neglects to produce, after having been ordered to do so, any pertinent book, paper, or document, . . . the deputy commissioner or Board shall certify the facts to the district court having jurisdiction in the place in

which he is sitting . . . which shall thereupon in a summary manner hear the evidence as to the acts complained of, and if the evidence so warrants, *punish such person in the same manner and to the same extent as for a contempt* committed before the court, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of or in the presence of the court.

33 U.S.C. §927(b) (emphasis added).⁸ Section 18.29(b) contains a similar enforcement provision except it gives the administrative law judge the option of whether to certify the facts to the court, and it does not limit the district court to its contempt powers. Section 27(b), however, states that the adjudicator “*shall* certify the facts to the district court,” and the mandatory language of the statute controls rather than the permissive language of the regulation. *Compare* 33 U.S.C. §927(b) *with* 29 C.F.R. §18.29(b).⁹ Thus, the Director’s argument that, pursuant to Section 27(b), the administrative law judge must certify the facts to the district court in order to sanction claimant’s abuse of the system is consistent with the plain language of the Act.

In *Creasy v. J.W. Bateson Co.*, 14 BRBS 434 (1981), the Board affirmed the administrative law judge’s denial of an employer’s motion for sanctions and held that FRCP 37, which identifies possible sanctions the district court may issue, is not applicable. In *Creasy*, the claimant failed to appear at his deposition and to answer interrogatories. The Board held that the appropriate action to be taken, pursuant to Section 27(a) of the Act, 33 U.S.C. §927(a), is a motion to compel. If the administrative law judge issues an order requiring compliance and the order is

⁸In 1972, the Act was amended to add Section 19(d), 33 U.S.C. §919(d), which provides for the transfer of adjudicative functions to the OALJ. Thus, since 1972, administrative law judges, rather than deputy commissioners (now called district directors), conduct formal hearings and hold the powers and duties granted deputy commissioners under Section 27 of the Act. See *Goicochea v. Wards Cove Packing Co.*, ___ BRBS ___, BRB No. 02-0439 (March 13, 2003); *Percoats v. Marine Terminal Corp.*, 15 BRBS 151, 153-154 (1982).

⁹Section 18.29(b) states:

Enforcement. If any person in proceedings before an adjudication officer disobeys or resists any lawful order or process, or misbehaves during a hearing or so near the place thereof as to obstruct the same, or neglects to produce, after having been ordered to do so, any pertinent book, paper or document, . . . the administrative law judge responsible for the adjudication, where authorized by statute or law, *may* certify the facts to the Federal District Court having jurisdiction in the place in which he or she is sitting to request appropriate remedies.

(emphasis added).

disobeyed, the Board stated that the next appropriate action is to refer the matter to district court for the imposition of sanctions under Section 27(b). *Creasy*, 14 BRBS at 436.

The Board recently reaffirmed this position when it held that the Act provides for Section 27(b) to be applied when a party fails to obey an order of the administrative law judge; consequently, as the Act is specific, neither the general rules of the OALJ nor the FRCP apply. *Goicochea*, slip op. at 4-6. In *Goicochea*, the claimant did not comply with the administrative law judge's orders to authorize release of his entire INS file to employer, and the administrative law judge therefore dismissed the claimant's claim. The Board vacated the dismissal of the case and remanded the case for the administrative law judge to "consider whether the certification of the facts to the appropriate district court pursuant to Section 27(b) of the Act is appropriate. . . ." *Id.*, slip op. at 6-7. In reaching this conclusion, the Board relied on the decisions of the United States Court of Appeals for the Ninth Circuit in *A-Z Int'l v. Phillips*, 179 F.3d 1187, 33 BRBS 59(CRT) (9th Cir. 1999), and *Metropolitan Stevedore Co. v. Brickner*, 11 F.3d 887, 27 BRBS 132(CRT) (9th Cir. 1993).

In *Brickner*, the Ninth Circuit addressed the relationship between the OALJ Rules, the FRCP and the Act in a case involving an administrative law judge's authority to assess costs under Section 26 of the Act, 33 U.S.C. §926, against a claimant who filed a claim in bad faith. The court held that neither the OALJ rules nor the FRCP apply because Section 26 of the Act provides the procedure for punishing a party who institutes or continues proceedings without reasonable grounds. *Brickner*, 11 F.3d at 891, 27 BRBS at 137-138(CRT) (also holding that Section 26 applies only to "courts," not to district directors, administrative law judges or the Board); see also *Boland Marine & Manufacturing Co. v. Rihner*, 41 F.3d 997, 29 BRBS 43(CRT) (5th Cir. 1995) (same). Further, in *Phillips*, the Ninth Circuit stated that Section 27(b) specifically, and exclusively, gives contempt power to the district courts once the facts are certified to it. *Phillips*, 179 F.3d at 1191, 33 BRBS at 62(CRT).¹⁰

Also of significance is the Ninth Circuit's decision in *Stevedoring Services of America v. Eggert*, 953 F.2d 552, 25 BRBS 92(CRT) (9th Cir.), *cert. denied*, 505 U.S. 1230 (1992). In *Eggert*, a case filed in district court involving an employer's request for repayment of overcompensation from the claimant, the Ninth Circuit explained that the district court has limited jurisdiction of enforcement under the Act.

¹⁰After proceedings in district court, the case again came before the Ninth Circuit. The court affirmed the district court's determination that Section 27(b)'s contempt sanctions do not apply when the alleged infraction is the filing of a fraudulent claim. Rather, the Ninth Circuit held that appropriate measures for fraud are set forth in Sections 31 and 48 of the Act, 33 U.S.C. §§931, 948. *A-Z Int'l v. Phillips*, ___ F.3d ___, No. 01-56689 (9th Cir. May 1, 2003) (2003 WL 1989622).

Specifically, two of the sections granting the district court jurisdiction, Sections 18(a) and 21(d), 33 U.S.C. §§918(a), 921(d), pertain to enforcing an employer's obligation to pay benefits, while Section 27(b) grants the district court authority to act when any party misbehaves during administrative proceedings. The Ninth Circuit stated that under Section 27(b), "district courts may punish as contempt of court any disobedience or resistance to a lawful order or process issued in the course of administrative proceedings under the Act." *Eggert*, 953 F.2d at 555, 25 BRBS at 96(CRT). It also stated: "[a] direct order of an ALJ to a claimant can be compelled by the district court using the means available for punishing contempt." *Id.* Because the employer's complaint was not an action to enforce an order, the district court did not have jurisdiction under Section 27(b). *Eggert*, 953 F.2d at 557, 25 BRBS at 100(CRT).

In rejecting the Director's interpretation of Section 27(b), the administrative law judge first stated that Section 27(b) is limited to actions "so disrespectful of the judicial process that they constitute contempt of court." Order to Suspend at 6. He drew this conclusion from the language of the section, which refers to punishing a party "as for a contempt," and he relied on 18 U.S.C. §401, which defines the appropriate punishments for criminal contempt as either a fine or imprisonment.¹¹ Thus, he stated, limiting the court to its criminal powers eliminates any conflict between the court's authority under Section 27(b) and his authority under the OALJ Rules to compel compliance by issuing a civil sanction. The Director contends that a party's behavior, *i.e.*, "disobey[ing] or resist[ing] any lawful order or process," is what triggers the need for certification under Section 27(b), not an administrative law judge's determination of whether the party's conduct is serious enough to warrant a finding that the party should be held in contempt. That is, the statement regarding contempt is a statement of the sanctions available to the district court following certification, and the type of punishment available does not dictate the applicability of Section 27(b). According to the Director, Section 27(b) contemplates both types of contempt, civil and criminal, so the administrative law judge is not authorized to issue any type of sanction.

We need not decide what type of "contempt" Section 27(b) contemplates because, as the Director correctly states, the language of the section demonstrates that the nature of a party's offense, rather than the sanctions available, invokes the applicability of Section 27(b). It is clear from the statements of the Ninth Circuit, within whose jurisdiction this case arises, that it interprets Section 27(b) as contemplating either punishing a party's misdeeds or compelling his compliance with a directive of the administrative law judge. *A-Z Int'l v. Phillips*, ___ F.3d ___, No. 01-56689 (9th Cir. May 1, 2003) (2003 WL 1989622); *Eggert*, 953 F.2d at 555, 25 BRBS at 96(CRT). In any event, once Section 27(b) is applied, it is for the district court to

¹¹18 U.S.C. §401 provides: "A court of the United States shall have power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority. . . ."

determine the appropriate sanction. *Goicochea*, slip op. at 6-7; *Creasy*, 14 BRBS at 436; see also *Chrysler Corp. v. Carey*, 186 F.3d 1016 (8th Cir. 1999); *Coastal Mart, Inc. v. Johnson Auto Repair, Inc.*, 196 F.R.D. 30 (E.D.Pa. 2000).

In this case, the administrative law judge's orders leave little doubt that claimant violated lawful orders and committed a number of infractions against the judicial process. Contrary to claimant's assertions, the administrative law judge's previous orders clearly delineate what he concludes are claimant's wrongdoings and abuses of the administrative process. The Act specifically provides that the administrative law judge's authority to seek a party's compliance with his orders is provided by Section 27(b). Consequently, regardless of the sanctions available to the district court, we hold that Section 27(b) applies to this case because claimant disobeyed the lawful orders of the administrative law judge.¹² *Goicochea*, slip op. at 6; *Creasy*, 14 BRBS at 436. Therefore, we reverse the administrative law judge's finding that Section 27(b) does not apply.¹³

The conclusion that Section 27(b) applies because claimant disobeyed orders and failed to produce documents does not necessarily leave the administrative law judge empty-handed. There remains a number of actions he may take to "discharge the duties of his office." 5 U.S.C. §556(c); 33 U.S.C. §927(a). First, the word "shall" in Section 27(b) requires the administrative law judge to follow that section if he decides sanctions should be implemented, but the administrative law judge has the authority to decide *whether* claimant's misconduct falls within Section 27(b) and

¹²The Director persuasively argues that the powers of the administrative law judge may not be analogized with those of bankruptcy judges or federal magistrate judges. Unlike administrative law judges under the Act, those judges are statutorily granted contempt powers. 28 U.S.C. §§151, 152, 636; *Church v. Steller*, 133 F.Supp.2d 215 (N.D.N.Y. 1999); *In re Norris*, 192 B.R. 863 (Bankr. W.D.La. 1995).

¹³Because the Section 27(b) of the Act supercedes the OALJ Rules in this case, contrary to the administrative law judge's statements, it is not the Director's interpretation of the OALJ Rules to which he must defer but, rather, to his interpretation of Section 27(b). See *generally Goicochea*, slip op. at 4-6. Additionally, the administrative law judge's reliance on *Harrison v. Barrett Smith, Inc.*, 24 BRBS 257 (1991), *aff'd mem. sub nom. Harrison v. Rogers*, 990 F.2d 1377 (D.C. Cir. 1993), is misplaced based on its specific facts. *Harrison* appears to be anomalous in not discussing Section 27(b). *Harrison* involved a *pro se* claimant who filed over 100 pleadings, failed to comply with discovery requests unless he was first paid benefits, and caused numerous delays of the proceedings to the extent that the claims became stale and the employers were prejudiced. The Board affirmed the administrative law judge's dismissal of the claims pursuant to FRCP 41(b) (involuntary dismissal for failure to comply with an order of the court), noting that, in addition, due to claimant's failure to cooperate, the record contained no evidence that would support claimant's claim of entitlement. Where a claim can be denied due to a failure of evidence, Section 27(b) would not come into play.

should be sanctioned. He may also recommend an appropriate sanction in the certification papers to the court.¹⁴ *Phillips*, 179 F.3d 1187, 33 BRBS 59(CRT).

Moreover, the administrative law judge retains control over the proceedings before him. In particular, he retains control over the admission of evidence and the direction of discovery. See *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999). For example, if a party does not submit evidence within his control, the administrative law judge may draw an adverse inference against that party and conclude that the evidence is unfavorable to that party. *Denton v. Northrop Corp.*, 21 BRBS 37 (1988); *Cioffi v. Bethlehem Steel Corp.*, 15 BRBS 201 (1982). If a party does not act with due diligence in obtaining evidence, the administrative law judge can close the record and exclude the evidence. *Smith v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 22 BRBS 46 (1989); *Sam v. Loffland Bros. Co.*, 19 BRBS 228 (1987); see also *Ezell*, 33 BRBS 19. An administrative law judge also may dismiss claims that have been abandoned, *Taylor v. B. Frank Joy Co.*, 22 BRBS 408 (1989), and can deny a claim for failure of the proponent to present credible evidence establishing a basis for an award. See generally *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

Claimant's Motions to the Board

Since the Board's Order dated October 18, 2002, wherein the Board denied claimant's motions for *en banc* review, expedited review, and oral argument, as well as employer's motion to dismiss, claimant has filed a number of other motions which we now address. On more than one occasion, claimant has asked the Board to take judicial notice of the district court's "determination" that the 1982 decision awarding permanent total disability benefits was really a "settlement" and cannot be modified. This contention relates to case #1504, so we deny this motion. The decision to which claimant refers, issued by the United States District Court for the Northern District of California on December 14, 2001, granted employer's motion to dismiss claimant's claim for lack of jurisdiction and commented on, but did not specifically address, the issue of whether the 1982 decision was a settlement pursuant to Section 8(i). See *Olsen v. Triple A Machine Shop*, No. 02-15112, 2003WI 21148727 (9th Cir. May 12, 2003). This decision, therefore, does not establish the invalidity of employer's attempt to modify the 1982 award. Additionally, claimant has filed a number of requests for judicial notice and to expand the record. Specifically, claimant seeks to have the Board take notice of a December 12, 2002, telephone deposition of Dr. Goldman and to include it in the record. We deny claimant's motions, as evidence may be submitted only to the administrative law judge. 33

¹⁴Although the administrative law judge considered the likelihood of delay as a reason why he should have the authority to issue sanctions, Congress has mandated the procedure to be followed. Delay should be minimized due to the specific language of Section 27(b) requiring that the court "in a summary manner hear the evidence" and decide on an appropriate sanction. 33 U.S.C. §927(b).

U.S.C. §921(b)(3); 20 C.F.R. §802.301.

In his reply brief, claimant requests the appointment of counsel, free of charge, pursuant to Section 39, 33 U.S.C. §939. The Secretary, at her discretion, is the only authority empowered to determine whether claimant is entitled to this assistance. The Secretary denied claimant legal assistance, and we deny claimant's motion.

On December 16, 2002, February 10 and 25, and March 18, 2003, claimant filed motions asking the Board to take judicial notice of a district court case he filed against an employer for the wrongful death of his father, *see Olsen v. General Engineering & Machine Works*, 25 BRBS 169 (1991) (father's case; Section 8(i) settlement precludes rehabilitation services), of the fact that he was twice hospitalized, and of the Ninth Circuit's future decision "on related cases," respectively. We deny all four motions because they lack relevance to the instant case.

Claimant also renewed his request for an expedited hearing. The Board does not hold hearings; consequently, we deny the motion.

Accordingly, the administrative law judge's Order to Suspend is vacated, and the case is remanded to the administrative law judge. Claimant's motions to the Board are denied.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge