BRB No. 96-1619

SALVATORE DEMARCO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GLOBAL TERMINAL AND CONTAINER SERVICES, INCORPORATED	)	DATE ISSUED:
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Order of Dismissal of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Michael E. Glazer (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

Lawrence P. Postol (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for self-insured employer.

Before: SMITH, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order of Dismissal (93-LHC-2499) of Administrative Law Judge Ralph A. Romano 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 findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant suffered an injury to his back on November 13, 1991, during the course of his employment with employer when he slipped and fell while working on a ship. Claimant, who was diagnosed with post-traumatic lower back derangement and lumbar discogenic disease, has not worked since the date of the accident. Employer voluntarily paid claimant temporary total disability benefits from November 14, 1991 through October 25, 1992, and permanent partial disability benefits from October 26, 1992 through April 8, 1993, at a compensation rate of $443.21 per week. *See* 33 U.S.C. §908(b), (c)(21). Thereafter, employer voluntarily paid to claimant permanent partial disability benefits at a

compensation rate of $130.50 per week from April 9, 1993 until June 22, 1995, when employer terminated benefits pursuant to Section 7(d)(4) of the Act, 33 U.S.C. §907(d)(4), contending that claimant failed to submit to a medical examination.

On November 17, 1994, Administrative Law Judge Gerald M. Tierney issued the first decision in the instant case. In his Decision on Motion for Partial Summary Judgment, Judge Tierney found that Guaranteed Annual Income payments cannot be used in the calculation of claimant's average weekly wage. A hearing was scheduled by Judge Tierney for April 1995 for resolution of the issue of employer's entitlement to relief under Section 8(f) of the Act, 33 U.S.C. §908(f). Thereafter, claimant filed an appeal of Judge Tierney's Decision on Motion for Partial Summary Judgment with the Board.

At the hearing held on April 13, 1995, the testimony of claimant primarily concerned the issue of average weekly wage, which had not yet been resolved. In addition, exhibits were submitted on behalf of both claimant and employer, including claimant's medical reports. On May 12, 1995, claimant filed a motion with the Office of Administrative Law Judges seeking modification of Judge Tierney's November 17, 1994 decision. In an Order dated July 19, 1995, the Board dismissed claimant's appeal of Judge Tierney's Decision on Motion for Partial Summary Judgment and remanded the case to the Office of Administrative Law Judges for consideration of claimant's motion for modification. Prior to the Board's Order, however, on July 12, 1995, Judge Tierney issued a decision remanding the case to the Office of the District Director for consideration of claimant's motion for modification, and the applicability of Section 7(d)(4). On July 19, 1995, claimant filed a motion for reconsideration with Judge Tierney, requesting that Judge Tierney, rather than the district director, rule on claimant's previous motion for modification.

On March 21, 1996, employer sent to claimant a set of twelve interrogatories and a request for production of documents. The interrogatories requested information with regard to claimant's medical history, average weekly wage, and educational and vocational abilities. Claimant returned the interrogatories to employer having answered, in his own handwriting, 10 of the 12 interrogatories; the answers to employer's interrogatories were not signed by claimant. On May 1, 1996, employer filed a motion to compel claimant to fully answer its interrogatories. Claimant filed an opposition to employer's motion. On June 12, 1996, Administrative Law Judge Ralph A. Romano (the administrative law judge) issued an Order Compelling Discovery, wherein the administrative law judge granted employer's motion, and ordered claimant to fully respond to, and to sign under oath, employer's interrogatories within 15 days. Claimant did not comply with the administrative law judge's Order. On July 8, 1996, employer moved for dismissal of claimant's claim pursuant to 20 C.F.R. §702.341, 29 C.F.R. §18.6(d), and Rule 37 of the Federal Rules of Civil Procedure. Claimant filed an opposition to this motion on July 15, 1996. In a one-sentence summary Order of Dismissal, the administrative law judge, on July 18, 1996, granted employer's July 8, 1996 motion to dismiss, and ordered "that this matter be and the same is DISMISSED under 29 C.F.R. Section 18.6(d)(v)."[1] Claimant's motion for reconsideration was summarily

[1]The specific citation is 29 C.F.R. §18.6(d)(2)(v).

denied by the administrative law judge on July 26, 1996.

On appeal, claimant contends that the administrative law judge erred in dismissing his claim. Specifically, claimant asserts that the administrative law judge's summary order dismissing his claim does not comply with the requirements of the Administrative Procedure Act. Claimant requests that the administrative law judge's order dismissing the claim be vacated and the case remanded to the administrative law judge for consideration of the merits of the claim. Employer responds, urging affirmance of the administrative law judge's order. For the reasons that follow, we reverse the administrative law judge's Order of Dismissal.

In the instant case, the administrative law judge based his dismissal of claimant's claim on Section 18.6(d)(2)(v) of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (the OALJ Regulations), which states that where a party fails to comply with a discovery order, an administrative law judge may render a decision against the non-complying party. 29 C.F.R. §18.6(d)(2)(v).[2] An administrative law judge's authority to dismiss a claim with prejudice stems from 29 C.F.R. §18.29(a), which affords the administrative law judge all necessary powers to conduct fair and impartial hearings and to take appropriate action authorized by the Federal Rules of Civil Procedure. *Taylor v. B. Frank Joy Co.*, 22 BRBS 408, 411 (1989). However, the OALJ Regulations, 29 C.F.R. Part 18, apply only to the extent they are not inconsistent with the Act or its implementing regulations, 20 C.F.R. Part 702. *See* 29 C.F.R. §18.1(a); *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989).

In *Creasy v. J.W. Bateson Co.*, 14 BRBS 434 (1981), the Board held that the appropriate action to be taken where a party refuses to be deposed or to answer interrogatories is a motion to compel pursuant to Section 27(a) of the Act, 33 U.S.C. §927(a). If an order is issued for the attendance or testimony of a witness or for the production of documents under Section 27(a), and that order is resisted, Section 27(b) of the Act, 33 U.S.C. §927(b), provides that the facts relating to such disobedience shall be certified to the appropriate United States district court for the imposition of sanctions. *See Phillips v. A-Z Int'l,* 30 BRBS 215 (1996); *Twigg v. Maryland Shipbuilding & Dry Dock Co.*, 23 BRBS 118 (1990). Inasmuch as the Act contains a specific provision dealing with the resistance of a lawful order, the Board has held that the sanctions imposed by Rule 37 of the Federal Rules of Civil Procedure are not applicable to cases arising under the Act. *Creasy*, 14 BRBS at 436-437; *see also Twigg*, 23 BRBS at 122. For the same reason, the OALJ Regulations permitting the dismissal of claims cannot be applied to a claimant who fails to comply with an order compelling discovery. *See generally Phillips*, 30 BRBS at 215; *Adams*, 22 BRBS at 81.

[2]The issue of whether 29 C.F.R. §18.6(d)(2)(v), in fact, authorizes an administrative law judge to dismiss a claim without analyzing the merits of the case is not before us.

In the instant case, the administrative law judge issued an Order Compelling Discovery on June 12, 1996, requiring claimant to respond to employer's interrogatories, and to sign the answers under oath. Claimant did not comply with the administrative law judge's order. As the Act contains a specific procedure to be followed if any person resists any lawful order, 33 U.S.C. §927(b), we hold that the administrative law judge erred in dismissing claimant's claim pursuant to the OALJ Regulations as these regulations governing dismissal of a claim are inapplicable in this situation. Accordingly, we reverse the administrative law judge's dismissal of claimant's claim, and we remand the case for further proceedings.

Moreover, we note that in dismissing the claim without explanation, the administrative law judge did not discuss the existence of any mitigating factors. It appears that much of the evidence sought to be discovered through employer's interrogatories had already been developed at the first hearing. For example, claimant responded to Interrogatory No. 2, which asked claimant to identify all medical examinations he had undergone in the last 10 years, by first stating that he could not remember them all, and then listing examinations by Drs. Swearingen and Parisi. Employer does not acknowledge that medical reports, including numerous reports from Drs. Patel and Parisi, and one from Dr. Swearingen, were submitted into the record at the first hearing by claimant. *See* Cl. Exs. 1-4, 8. Indeed, employer submitted medical reports as well, including two by Dr. Swearingen. *See* Emp. Exs. 13-16.[3] Additionally, the only two interrogatories claimant did not answer at all were ones which requested that claimant identify the expert and other witnesses who would testify at the hearing. This information, however, was contained in a letter dated May 21, 1996, from claimant's counsel, which informed employer's counsel that he expected to call as witnesses claimant, Dr. Parisi, and Dr. Patel. Thus, on remand the administrative law judge should determine if employer's interrogatories were necessary, or if claimant's non-responsiveness to these questions would have prejudiced employer had the administrative law judge scheduled a second hearing. *See generally Twigg*, 23 BRBS at 121. Should the administrative law judge nevertheless conclude that sanctions may be warranted, the administrative law judge must follow the specific procedures set forth in Section 27(b) of the Act.

[3]The medical reports of record, including those of Dr. Swearingen, an independent medical examiner, uniformly state the claimant has a serious back condition, at least in part as a result of his work-related injury.

Accordingly, the administrative law judge's Order of Dismissal is reversed, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. MCGRANERY
Administrative Appeals Judge