

CARLOS GOICOCHEA)
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 Claimant-Petitioner)
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 v.)
)
 WARDS COVE PACKING COMPANY)
)
 and)
)
 ALASKA NATIONAL INSURANCE) DATE ISSUED: MAR 13, 2003
 COMPANY)
)
 Employer/Carrier-)
 Respondents)
)
 DIRECTOR, OFFICE OF WORKERS=)
 COMPENSATION PROGRAMS,)
 UNITED STATES DEPARTMENT)
 OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Order Granting Employer=s Motion to Dismiss of Alexander Karst, Administrative Law Judge, United States Department of Labor, and the Order Requiring Claimant to Execute Release and Continuing Final Hearing, the Order Denying Protective Order and Requiring Claimant to Execute Release, and the Order Denying Claimant=s Renewed Motion for Protective Order, of William Dorsey, Administrative Law Judge, United States Department of Labor.

Nicole A. Hanousek and Brady Martin (Law Offices of William D. Hochberg), Edmonds, Washington, for claimant.

Raymond H. Warns, Jr. (Holmes Weddle & Barcott), Seattle, Washington, for employer/carrier.

Kathleen H. Kim and Peter B. Silvain, Jr., (Howard Radzely, Acting

Solicitor of Labor; John F. Depenbrock, Associate Solicitor; Burke M. Wong, 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 appeals the Order Granting Employer=s Motion to Dismiss (01-LHC-1290) of Administrative Law Judge Alexander Karst, and the Order Requiring Claimant to Execute Release and Continuing Final Hearing, the Order Denying Protective Order and Requiring Claimant to Execute Release, and the Order Denying Claimant=s Renewed Motion for Protective Order of Administrative Law Judge William Dorsey, 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). The Board heard oral argument in this case on January 29, 2003, in Seattle, Washington.

On December 1, 1997, claimant sustained a work-related right knee injury, for which he underwent two arthroscopic surgeries. Employer voluntarily paid claimant temporary total disability compensation until June 23, 2000, and then permanent partial disability compensation for a four percent impairment to the knee. 33 U.S.C. '908(b), (c)(2). Claimant thereafter sought additional benefits under the Act, and the parties subsequently disagreed as to the permanent partial disability rating for claimant=s knee and whether he was entitled to total disability compensation during a vocational retraining program. During discovery proceedings before Administrative Law Judge Dorsey, claimant was deposed on August 21, 2001. At his deposition, claimant testified that he was a citizen of Peru, that he was in the United States without a Green card@ but that he had been granted a work permit, that he received political asylum in 1997, and that he was waiting for a hearing regarding his asylum status. Explaining his request for asylum, claimant testified that his brother is a policeman in Peru and that the Peruvian Shining Path guerilla group was threatening policemen and their families.

On August 31, 2001, employer sent a subpoena to the Los Angeles Asylum Office of the Immigration and Naturalization Service (INS) to obtain all documents relating to claimant. Approximately 10 days later, the INS informed employer=s attorney that it would not honor the subpoena. The INS requested that claimant sign

a Freedom of Information Act (FOIA)/Privacy Act release. Employer sent by facsimile a FOIA form to claimant's attorney on September 14, 2001. On September 21, 2001, employer's attorney received a letter from claimant's counsel stating that since the formal hearing was scheduled for October 15, 2001, and the exhibits had been exchanged, he considered employer's request to be untimely and that claimant therefore would not sign the release form. On September 25, 2001, employer filed a Motion for Order Compelling Discovery with Judge Dorsey. Claimant filed a response in opposition to the motion. On October 3, 2001, employer filed a Motion for Order of Continuance. On October 5, 2001, Judge Dorsey issued an Order Requiring Claimant to Execute Release and Continuing Final Hearing. On October 17, 2001, claimant requested a Protective Order and sought a telephone conference regarding his asylum records. On October 18, 2001, Judge Dorsey issued an Order Denying Protective Order and Requiring Claimant to Execute Release. On November 6, 2001, claimant filed a Motion for Protective Order, and employer filed a response and a Motion for Sanctions. Claimant filed a reply to employer's motion on November 15, 2001. On December 3, 2001, Judge Dorsey issued an Order Denying Claimant's Renewed Motion for Protective Order.

Following the issuance of Judge Dorsey's last order, the case was reassigned to Administrative Law Judge Karst (the administrative law judge). Employer thereafter filed a Motion to Dismiss, averring that claimant had failed to comply with Judge Dorsey's multiple orders. Claimant did not file a response to employer's motion to dismiss. On February 27, 2002, the administrative law judge, citing Rules 41(b) and 37(b)(2)(C) of the Federal Rules of Civil Procedure, entered an order dismissing the claim based on claimant's failure to comply with Judge Dorsey's orders and on what he deemed to be claimant's complete recalcitrance with respect to the discovery process, claimant's disregard of warnings about potential sanctions, and claimant's failure to respond to employer's motion to dismiss.

On appeal, claimant challenges the administrative law judge's dismissal of the case, as well as Judge Dorsey's orders requiring claimant to execute a release for his INS records. Employer initially responded urging affirmance of the administrative law judge's dismissal of claimant's claim, to which claimant replied. Following the Board's setting the case for oral argument, the Director, Office of Workers' Compensation Programs (the Director), filed his brief arguing that the dismissal order must be vacated and the case remanded for the administrative law judge to certify the facts to the appropriate district court for a determination of sanctions pursuant to Section 27(b) of the Act, 33 U.S.C. '927(b). Thereafter, employer filed a brief in response to the Director, agreeing with the Director that the case should be remanded to the administrative law judge so that the facts may be

certified to the appropriate district court.

We will initially address claimant=s contention that the administrative law judge erred in dismissing his claim with prejudice. It is undisputed that claimant in the case at bar did not comply with the orders issued by Judge Dorsey directing claimant to execute an authorization allowing for the release of his INS records to employer. The administrative law judge characterized claimant=s failure to comply with these orders as showing Acomplete recalcitrance with respect to the discovery process and Judge Dorsey=s orders, @ found that claimant Athwarted the discovery process, @ and stated that claimant Awillfully disobeyed court orders. @ See Order Granting Employer=s Motion to Dismiss at 1-2. Pursuant to these findings, and citing Rules 41(b) and 37(b)(2)(C) of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 41(b), 37(b)(2)(C), the administrative law judge dismissed claimant=s claim with prejudice. *Id.*

We agree with the Director that the instant case must be remanded to the administrative law judge for consideration under Section 27(b) of the Act, 33 U.S.C. '927(b). Specifically, since the conduct cited by the administrative law judge involves claimant=s failure to obey a lawful order, it falls within Section 27(b) of the Act. As the Act contains a specific provision governing this situation, the rules of procedure relied upon by the administrative law judge in dismissing claimant=s claim are not applicable. See *Metropolitan Stevedore Co. v. Brickner*, 11 F.3d 887, 27 BRBS 132(CRT) (9th Cir. 1993); *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989); 29 U.S.C. '18.1(a); see also 33 U.S.C. '923(a); *Twiggs v. Maryland Shipbuilding & Dry Dock Co.*, 23 BRBS 118 (1989).

Section 27(b) of the Act, provides:

If any person in proceedings before a deputy commissioner or Board *disobeys or resists any lawful order or process, . . . 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 (or to the United States District Court for the District of Columbia if he is sitting in such District) which shall thereupon in a summary manner hear the evidence as to the acts complained of, and, if the evidence so warrants, punish the 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 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).¹ Thus, under Section 27(b) of the Act, the district court 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. See *A-Z Int'l v. Phillips*, 179 F.3d 1187, 33 BRBS 59(CRT) (9th Cir. 1999), citing *Stevedoring Services of America v. Eggert*, 953 F.2d 552, 554, 25 BRBS 92 (CRT) (9th Cir.), cert. denied, 505 U.S. 1230 (1992). Under Section 27(b), the administrative law judge certifies the facts surrounding a party=s failure to obey an order or to produce pertinent documents after being ordered to do so to the district court for action. As the Act thus specifies the manner in which conduct like that of claimant here is to be dealt with, neither the general Rules of Practice for the Office of Administrative Law Judges (OALJ), 29 C.F.R. Part 18, nor the Federal Rules of Civil Procedure apply.

¹In 1972, the Act was amended to add Section 19(d), which provides for the transfer of adjudicative functions to the Office of Administrative Law Judges (OALJ). 33 U.S.C. '919(d). Thus, since 1972, administrative law judges, rather than deputy commissioners (now referred to as district directors), conduct formal hearings, and hold the powers and duties granted deputy commissioners under Section 27 of the Act. See *Percoats v. Marine Terminal Corp.*, 15 BRBS 151, 153-154 (1982).

The United States Court of Appeals for the Ninth Circuit, in whose jurisdiction this case arises, explained this interaction between the Act, the OALJ Rules, and the Federal Rules in *Brickner*, 11 F.3d 887, 27 BRBS 132(CRT). In *Brickner*, the Ninth Circuit held that Rule 11 of the Federal Rules of Civil Procedure was not applicable where claimant filed a claim in bad faith under the Act, because Section 26 of the Act, 33 U.S.C. '926, provides a specific sanction for that situation. In reaching this decision, the court found that, while the OALJ regulations incorporate the Federal Rules in any situation not provided for or controlled by these rules, or by any statute, executive order or regulation, 29 C.F.R. '18.1(a), a regulation 18.1(a) does not purport to apply when the situation is otherwise provided by statute.² See *Brickner*, 11 F.3d at 891, 27 BRBS at 137(CRT). Thus, the court concluded that ordinarily, when Congress has provided a particular remedy [the] court will not imply a different one. @ *Id.*, 11 F. 3d at 891, 27 BRBS at 138 (CRT), citing *Eggert*, 953 F.2d 552, 25 BRBS 92(CRT). With regard specifically to Section 27(b), the Ninth Circuit has stated that the language of Section 27(b) of the Act clearly contemplates that the district court holds the contempt power exclusively once the facts concerning the alleged contumacious conduct are certified to it. See *A-Z Int'l*, 179 F.3d at 1191, 33 BRBS at 62(CRT).

As Section 27(b) of the Act provides the sanction to be applied where a party fails to obey an administrative law judge's order, we hold that the administrative law judge erred in relying upon the Federal Rules of Civil Procedure to dismiss claimant's claim based upon claimant's failure to comply with the multiple orders issued by Judge Dorsey, and in not considering the applicability of Section 27(b) to the facts before him.³ As claimant's failure to execute and deliver an authorization

²The court also concluded that Rule 81(a)(6), which provides for application of the Federal Rules to A proceedings for enforcement or review of compensation orders under [the Act] . . . except to the extent that matters of procedure are provided for in that Act, @ did not make Rule 11 applicable to the hearing before an administrative law judge. See *Brickner*, 11 F.3d at 891, 27 BRBS at 137(CRT).

³Employer cites Section 18.29(a)(8) of the OALJ regulations, 29 C.F.R. '18.29(a)(8), as a source of authority for the administrative law judge's decision to dismiss claimant's claim. An administrative law judge's authority in general 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. See *Taylor v. B. Frank Joy Co.*, 22 BRBS 408 (1989). As Section 27(b) of the Act is a A rule of special application @ which addresses the issue presented on appeal, however, the OALJ regulations do not apply. 29 C.F.R. '18.1(a).

releasing his INS records to employer was in direct noncompliance with Judge Dorsey=s orders, it constitutes conduct which should be addressed under the procedural mechanism of Section 27(b). Rather than dismissing claimant=s claim, the administrative law judge must follow the procedures provided for in Section 27(b) of the Act. Accordingly, we vacate the administrative law judge=s dismissal of claimant=s claim, and we remand the case to 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 in the instant case.⁴

⁴In its reply brief, employer, citing the Ninth Circuit=s decision in *A-Z Int=l v. Phillips*, 179 F.3d 1187, 33 BRBS 59(CRT) (9th Cir. 1999), argues that the administrative law judge should be instructed on remand to issue a Decision and Order in which he makes findings of fact and recommends the sanction of dismissal to the district court. As *A-Z Int=l* holds that the Board lacks jurisdiction to address the administrative law judge=s certification under Section 27(b), such an instruction is outside the scope of our review. In *A-Z Int=l*, moreover, the Ninth Circuit stated that an administrative law judge=s recommendation of specific sanctions, rather than merely reciting the facts constituting disobedience while leaving the determination of sanctions to the district court, was only one reasonable and sufficient method of certification in the absence of specific regulations. *Id.* 179 F. 3d at 1194, 33 BRBS at 63-64(CRT). Thus, it is for the administrative law judge to decide whether to recommend a particular sanction.

Claimant next challenges the multiple Orders issued by Judge Dorsey, arguing that those Orders, which require claimant to execute a release of his INS file to employer, should be vacated.⁵ Claimant initially argues that employer=s initial Motion to Compel the release of claimant=s INS records should have been rejected by Judge Dorsey since that request was not timely and was in violation of the discovery deadlines established in the May 11, 2001 Notice of Calendar Call. It is undisputed that the deadline for discovery was established as twenty days prior to the October 15, 2001, Calendar Call, or September 25, 2001. Employer=s initial request for the release of claimant=s INS records was received by claimant=s counsel on September 14, 2001. Claimant asserts that the language of the administrative law judge=s pre-hearing order forbids the initiation of discovery requests and motions to compel which cannot be completed before the discovery date, and since employer=s request was received eight days before the discovery deadline, employer could not reasonably have expected to meet that deadline even if claimant had complied with the release request. Accordingly, claimant avers that Judge Dorsey=s subsequent acceptance of employer=s motion on October 5, 2001, is in error. We disagree.

The specific arguments raised by claimant were considered and rejected by Judge Dorsey, who found employer=s request timely, as the discovery deadline was set for September 25, 2001, while employer asked claimant to execute the release on September 14, 2001, prior to that deadline. Judge Dorsey rejected claimant=s

⁵The Director did not address claimant=s refusals to comply with the administrative law judge=s orders, as the merits of claimant=s refusals are for the District Court to address following certification of the facts. We agree that the Board lacks jurisdiction to address claimant=s conduct in response to the administrative law judge=s orders. *A-Z Int=l v. Phillips*, 179 F.3d 1187, 33 BRBS 59(CRT) (9th Cir. 1999). However, as the discovery orders are interlocutory orders, the determinations therein are subject to appellate review once, as here, a final order has issued. Thus, while we make no comment on claimant=s failure to comply with the Orders, we will review the Orders themselves under the appropriate standard of review. See *Butler v. Ingalls Shipbuilding, Inc.*, 28 BRBS 114 (1994).

contention that it was unrealistic to believe that if the release had been executed when requested, the INS would have turned the material over before the September 25, 2001, deadline for discovery, reasoning that employer=s effort to obtain the records by subpoena was timely, that employer reasonably believed that its request would be honored, and that employer acted promptly in requesting claimant=s release upon being informed by the INS that it would be required. Thus, Judge Dorsey concluded that in not signing the release, claimant made it impossible to know whether the INS would have responded to the record request within the time available before the discovery cut-off date. As Judge Dorsey=s determination on this issue is rational and supported by the record, we affirm his conclusion that employer=s motion to compel was timely.

Claimant next argues that his INS records are not relevant to the issues presented in the instant case and that, thus, he should not be required to produce those records for employer=s review.⁶ Employer, in response, argues that since it is its position that claimant would not be entitled to vocational retraining and total disability benefits during that retraining if he is in this country illegally and facing deportation, claimant=s INS file is relevant to the instant proceeding.⁷ Judge Dorsey

⁶We reject employer=s contention that the issue of the relevancy of claimant=s INS file should not be addressed because claimant did not raise it below. Claimant=s November 1, 2001, Motion for Protective Order, specifically stated that A[t]here is no reasonable basis to believe there is any proximate causal connection between Mr. Goicochea=s political asylum records and his worker=s compensation claim.@ See Claimant=s November 1, 2001 Motion at 4. This statement can certainly be construed as a challenge to the relevance of claimant=s immigration status to his Longshore claim. Additionally, in claimant=s November 15, 2001, reply to employer=s response to Motion for Protective Order, claimant asserts: A[Claimant=s] sensitive and federally protected political asylum records are not relevant to his workers= compensation claim.@ See Claimant=s November 15, 2001, Reply at 6. Therefore employer=s argument that claimant did not raise the issue of relevancy below is without merit.

⁷The vocational assessment and rehabilitation plan for claimant listed claimant=s inability to communicate in English as a barrier to obtaining employment and suggested that claimant take an English language course as part of retraining. Employer=s reasoning for seeking to obtain claimant=s immigration records is that Aif the claimant is in this country illegally, then the issue of whether or not he should be taught English and vocationally retrained is moot.@ Affidavit in Support of Motion for Order Compelling Discovery at 3. Employer concedes that claimant can be entitled to benefits regardless of his immigration status. Benefits due under the Act are payable regardless of whether a foreign national remains in the United States.

summarily found that claimant=s INS file bears on the issues of claimant=s credibility and his post-injury employability. See Order Denying Claimant=s Renewed Motion for Protective Order at 2; Order Requiring Claimant to Execute Release and Continuing Final hearing at 2. For the reasons that follow, we vacate Judge Dorsey=s Orders compelling discovery and remand the case to the administrative law judge for further consideration.

It is well-established that an administrative law judge has broad discretion to direct and authorize discovery. See *Tignor v. Newport News Shipbuilding & Dry Dock Co.*, 29 BRBS 135 (1995). The administrative law judge=s broad discretionary power includes limiting document requests to relevant material. See *Olsen v. Triple A Machine Shops, Inc.*, 25 BRBS 40 (1991), *aff=d mem. sub nom. Olsen v. Director, OWCP*, 996 F.2d 1226 (9th Cir. 1993). The administrative law judge did not adequately explain his conclusion that claimant=s INS records are relevant to the issue of claimant=s credibility, or how claimant=s credibility would affect the disability issues presented. The fact of injury is undisputed, and the issues for resolution concern the degree of permanent impairment under the schedule, 33 U.S.C. '908(C)(2), which involves a medical determination, and claimant=s entitlement to total disability during vocational rehabilitation, which involves whether claimant was enrolled in a DOL-approved rehabilitation program. See *Louisiana Ins. Guaranty Assn. v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994).

Moreover, with regard to whether claimant=s INS records are relevant to the rehabilitation efforts undertaken pursuant to the Act, Section 39(c)(1), (2) of the Act, 33 U.S.C. '939(c)(1), (2), and its implementing regulations, 20 C.F.R. "702.501 *et seq.*, authorize the Secretary of Labor to provide for the vocational rehabilitation of permanently disabled employees. See *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Brickhouse]*, 315 F.3d 286, 36 BRBS 85(CRT) (4th Cir. 2002). Because Section 39(c)(2) grants the authority for directing vocational rehabilitation to the Secretary and her designees, the district directors, the administrative law judge is not authorized to address the propriety of a vocational rehabilitation plan. See *Olsen v. Gen. Eng=g & Machine Works*, 25 BRBS 169 (1991); *Cooper v. Todd Pacific Shipyards Corp.*, 22 BRBS 37 (1989). Thus, whether claimant=s vocational rehabilitation plan is reasonable or necessary is a discretionary one afforded the district director, and the administrative law judge cannot review the plan or deny claimant rehabilitation services. Under *Abbott*, the administrative law judge=s inquiry concerns whether claimant is enrolled in a DOL program which precludes his obtaining alternate employment. Accordingly, on remand, the administrative law judge should consider the relevancy of claimant=s INS records in the context of the issues before him.

See generally *Logara v. Jackson Engineering Co.*, 35 BRBS 83 (2001).

Finally, claimant asserts that Judge Dorsey's October 18 and December 3 orders denying him a protective order were not in accordance with law. We need not address each of claimant's specific arguments,⁸ as there is merit in claimant's complaint that Judge Dorsey did not consider whether less intrusive means of employer's obtaining the relevant information exists than public disclosure of claimant's full INS file. Claimant's request rests on his testimony that he has sought asylum in the United States due to a Peruvian terrorist group which he asserts threatens himself as well as his family remaining in Peru. Despite these serious allegations, Judge Dorsey did not address the alternative methods of fulfilling his discovery order and providing employer the information it requires which were raised by claimant. Specifically, in claimant's November cover letter accompanying his request for Judge Dorsey to reconsider his orders to execute a release for claimant's INS records, claimant's counsel asserted that on October 17, 2001, she and employer's counsel agreed to hold a telephone conference to discuss whether there should be a limitation of use of claimant's records, and whether it would be in the best interest of both parties to have an *in camera* review of those records.⁹ In his brief supporting the motion, claimant requested that Judge Dorsey order such an *in camera* review and release only those INS documents necessary to claimant's claim, limit employer's use solely to this claim and bar its further release to any other individual or entity. The administrative law judge did not address claimant's request for a telephone conference or his alternative request for an *in camera* review of the records sought by employer. Accordingly, should the administrative law judge on remand determine that claimant's INS records are relevant to the issues presented for adjudication before him, he must address

⁸Claimant contends that a protective order may be granted for reasons other than asserting a specific privilege and argues that under Rule 26 of the Federal Rules, Fed. R. Civ. P. 26, a protective order may be granted to protect a party from annoyance, embarrassment, oppression or undue burden or expense. Claimant did not, however, raise this ground before the administrative law judge. The administrative law judge also rejected claimant's request for a protective order on the ground it was untimely as claimant did not file objections within the 10-day period for moving to quash or limit a subpoena. 29 C.F.R. '18.4(c). Claimant correctly argues this provision does not apply to him, as the subpoena was directed to the INS office.

⁹ Employer concedes that claimant requested that the administrative law judge grant an *in camera* review of his INS records on November 1, 2001. See Tr. of Oral Argument at 40-41.

claimant=s request for an *in camera* review of those documents that the administrative law judge deems relevant.¹⁰

¹⁰Claimant argues that his employment authorization cards, copies of which were submitted to the administrative law judge, establish that he is allowed to remain and work in the United States. The administrative law judge acknowledged that the cards could do so if valid, but stated that release of claimant=s INS file was necessary to establish their validity. See December 3, 2001, Order at 2. However, a hearing would allow the administrative law judge the opportunity to examine the original card and permit the parties to address any legitimate concerns about the card=s validity.

Accordingly, the administrative law judge=s Order Granting Employer=s Motion to Dismiss and the Order Requiring Claimant to Execute Release and Continuing Final Hearing, the Order Denying Protective Order and Requiring Claimant to Execute Release, and the Order Denying Claimant=s Renewed Motion for Protective Order are vacated, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge