

BRB No. 02-0821

ROBERT W. DODD

Claimant-Petitioner

v.

CROWN CENTRAL PETROLEUM CORPORATION

and

LIBERTY MUTUAL INSURANCE COMPANY

Employer/Carrier- Respondents

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Party-in-Interest

DATE ISSUED: 08/07/2003

DECISION and ORDER

Appeal of the Order of Dismissal of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Robert W. Dodd, Houston, Texas, *pro se*.

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

PER CURIAM:

Claimant, without counsel, appeals the Order of Dismissal (2002-LHC-0470) of Administrative Law Judge Larry W. Price 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). In an appeal by a claimant without representation by

counsel, the Board will review the administrative law judge's findings of fact and conclusions of law in order to determine if they are supported by substantial evidence, are rational, and are in accordance with law. If they are, they must be affirmed. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant, who was also without an attorney before the administrative law judge, filed a claim pursuant to Section 49 of the Act, 33 U.S.C. §948a, against employer, stemming from employer's alleged treatment of claimant following his work-related knee injury on October, 24, 1995.¹ Claimant filed a document with the administrative law judge listing many actions that he alleged demonstrates employer's discrimination against him. Significantly, he alleged that employer's attorney, Andrew Schreck, was part of this pattern of discrimination and claimant stated he intended to call Mr. Schreck as a witness at the hearing. Claimant sought to have Mr. Schreck removed as employer's attorney for this reason. In addition, claimant obtained subpoenas for the following persons and documents they allegedly controlled: William Tyler, employer's director of human resources; Lester Keith, claimant's supervisor; District Director Chris Gleasman; Norma Delgado, of Congressman Tom Delay's office; and Andrew Schreck, employer's workers' compensation attorney.

The administrative law judge denied claimant's motion to recuse Mr. Schreck as employer's attorney. Orders dated February 21, 2002 and March 21, 2002. The Director, Office of Workers' Compensation Programs (the Director), filed a motion to quash the subpoena of District Director Gleasman, to which claimant responded. Mr. Schreck filed motions to quash the subpoenas of William Tyler, Lester Keith, and himself, to which claimant responded. The administrative law judge granted the motion to quash the

¹In its last decision on the merits of claimant's disability claim, *Dodd v. Crown Central Petroleum Corp.*, 36 BRBS 85 (2002), the Board rejected claimant's contention that the administrative law judge erred in finding that employer did not withhold relevant documents from him. The Board affirmed the denial of total disability benefits from October 25, 1995, through January 16, 1996, while claimant was working, but remanded the case for the administrative law judge to consider whether an award of partial disability benefits was appropriate for this time period. The Board affirmed the administrative law judge's finding that claimant was totally disabled commencing January 17, 1996, as unchallenged on appeal. However, the Board also affirmed the finding that claimant's compensation should be suspended, pursuant to Section 7(d)(4) of the Act, 33 U.S.C. §907(d)(4), due to claimant's unreasonable refusal to be examined by a physician, as ordered by the administrative law judge. The Board remanded the case for the administrative law judge to determine the date of claimant's refusal to be examined, as the suspension of benefits cannot pre-date the refusal. 36 BRBS at 88-89. Claimant's motion for reconsideration was denied. Board Order dated Jan. 28, 2003.

subpoena of the district director. Order dated May 6, 2002. The administrative law judge summarily denied claimant's motion for reconsideration of this Order. Order dated May 14, 2002.

The administrative law judge granted in part and denied in part the motions to quash the subpoenas of William Tyler and Lester Keith. Orders dated May 9, 2002. The administrative law judge denied claimant's allegations that the motions to quash were filed out of time and also denied employer's contentions that the subpoenas were not properly served. The administrative law judge granted certain document requests, but denied others. In addition, the administrative law judge stated that Mr. Tyler and Mr. Keith must appear at the formal hearing to testify. Both claimant and employer sought reconsideration of the administrative law judge's orders. A telephone conference was held on the motions to reconsider. As a result, the administrative law judge quashed in its entirety the subpoena of Mr. Keith. As to Mr. Tyler, the parties arranged for the exchange of the requested documents and Mr. Tyler agreed to be available to testify at the hearing. Order dated May 13, 2002.

With regard to the subpoena of Mr. Schreck, the administrative law judge granted the motion to quash in its entirety. The administrative law judge disagreed with Mr. Schreck that an employer's attorney cannot, as a matter of law, be a witness in a Section 49 claim, but agreed that claimant failed to establish that, in this case, Mr. Schreck was involved in any employment decisions related to claimant. Order dated May 10, 2002. Claimant also filed a motion to compel Mr. Schreck to answer interrogatories. Mr. Schreck responded with a motion for a protective order on the ground that he is not a party to the proceedings under 29 C.F.R. §18.18. The administrative law judge granted Mr. Schreck's motion, stating that as Mr. Schreck is not a party, interrogatories are not appropriate. Order dated May 10, 2002.

Claimant subsequently wrote to the administrative law judge to seek clarification of the scope of the formal hearing and a definition of "discrimination" under Section 49.² The administrative law judge responded with an order entitled, "Order Denying Request for Legal Advice" dated July 10, 2002. The administrative law judge stated he would not detail every conceivable action that might constitute discrimination under Section 49, and stated, not for the first time, that claimant would not be permitted to re-litigate the merits

² Section 49 prohibits employer from discriminating against an employee "as to his employment" because the employee has claimed compensation or testified in a compensation proceeding. 33 U.S.C. §948a; 20 C.F.R. §702.271(a). In one of its pleadings filed with the administrative law judge, employer stated that claimant was not terminated by employer, but took an early retirement. Claimant responded that he took early retirement under duress and due to intimidation.

of his disability claim.

On July 20, 2002, claimant filed a motion that the administrative law judge recuse himself on the grounds, *inter alia*, that the administrative law judge denied his discovery requests, allowed Mr. Schreck to continue as employer's attorney, and failed to explain to claimant the manner in which the case would proceed. The formal hearing was convened on July 23, 2002; claimant was not in attendance. Mr. Schreck was present, as was Mr. Tyler. The administrative law judge stated on the record that he telephoned claimant to ascertain why he was not at the hearing. Tr. at 6. The administrative law judge stated that he told claimant the motion to recuse was denied. He further stated that claimant told him he refused to participate in the hearing and had called the administrative law judge "dishonest." Tr. at 6-7. The administrative law judge stated his intent to dismiss the case. Subsequently, by Order of Dismissal filed on July 30, 2002, the administrative law judge dismissed the Section 49 claim by reason of abandonment. He recounted his telephone conversation with claimant on July 23, and noted that he received express mail from claimant on the afternoon of July 23, mailed on July 22, in which claimant also stated that he would not participate in the hearing.

Since claimant is appealing without an attorney, we will review the administrative law judge's orders regarding the subpoenas and motions to recuse and for interrogatories, as well as the Order of Dismissal.³ Neither employer nor the Director has responded to this appeal.

RECUSAL OF EMPLOYER'S COUNSEL

We affirm the administrative law judge's orders denying claimant's motions to recuse Mr. Schreck. Mr. Schreck represented to the administrative law judge that, as an officer of the court, he had never been asked by employer to act as its agent in any employment decisions or actions with regard to claimant. Claimant's allegations against Mr. Schreck seemingly stem from employer's litigation posture in the disability claim. As the administrative law judge rationally determined that Mr. Schreck was not involved in any employment actions concerning claimant, he properly allowed Mr. Schreck to remain as employer's attorney. *See generally Baroumes v. Eagle Marine Services*, 23 BRBS 80 (1989).

³To the extent that claimant seeks to have the Board reconsider its decision on the merits of his claim, we decline to do so, as that case is not properly before the Board. The disability claim was remanded for further findings by Administrative Law Judge Kennington. *Dodd*, 36 BRBS at 89.

QUASHING SUBPOENAS⁴

District Director Gleasman: claimant requested documents the district director used to formulate his memorandum of informal conference; the complete file on the 1992 disability claim; and copies of any documents, correspondence, or tapes regarding employer's alleged default. The subpoena also directed the district director to appear at the hearing to testify. The Director filed a motion to quash this subpoena on the grounds that claimant had already been provided with all non-privileged documents in response to a FOIA request, and that the district director has no personal knowledge of any facts surrounding the alleged discrimination by employer. The Director stated that the only information the district director possessed is protected "pre-decisional, deliberative" material which the district director is not required to disclose.

The administrative law judge granted the motion to quash. He noted that claimant did not aver that he had not received all non-privileged documents. With regard to the allegedly privileged documents, the administrative law judge essentially found that they are irrelevant as any proceeding before the administrative law judge is *de novo*, without regard to any recommendations made by the district director. The administrative law judge also found that the district director has no personal knowledge of any facts concerning claimant's claim of discrimination and therefore is not a proper witness.

We affirm the administrative law judge's order granting the motion to quash the subpoena of the district director. The regulation at 29 C.F.R. §18.14 limits discovery to non-privileged items.⁵ "[A]dvisory reports by individuals without authority to issue final

⁴There was no motions activity on the subpoena of Ms. Delgado of Congressman Delay's office. With regard to Mr. Tyler, the parties agreed to an exchange of documents and Mr. Tyler appeared at the formal hearing. *See* Order of May 13, 2002, and Tr. at 5. Thus, we need not review the propriety of the administrative law judge's orders concerning Mr. Tyler.

⁵Section 18.14(a) states:

Unless otherwise limited by order of the administrative law judge in accordance with these rules, the parties may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter involved in the proceeding,

29 C.F.R. §18.14(a) (emphasis added).

agency dispositions are predecisional,” *A. Michael's Piano, Inc. v. F.T.C.*, 18 F.3d 138 (2^d Cir. 1994), citing *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168 (1975), and such materials are privileged. *Id.* Moreover, the administrative law judge properly found that any privileged documents the district director has are irrelevant, as proceedings before the administrative law judge are *de novo*, that is without regard for any recommendations made by the district director, and the district director’s memorandum of informal conference is not to be admitted into the record before the administrative law judge. *Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1986); 20 C.F.R. §702.317(c). As claimant received all non-privileged documents and as the administrative law judge rationally found that the district director has no personal knowledge of facts surrounding claimant’s Section 49 claim, the administrative law judge did not err in quashing the subpoena of the district director.

Lester Keith (Supervisor of Oil Movements, and claimant’s supervisor with employer): claimant requested, *inter alia*, documents demonstrating Mr. Keith’s areas of responsibility with regard to reporting and investigating accidents; documents concerning employer’s “light-duty” policy; and directives with regard to posting of notices as to where and how an employee should report work injuries. Employer filed a motion to quash on the ground that none of the items requested pertains to any adverse employment action allegedly taken against claimant, and that, in any event, Mr. Keith does not have any items responsive to several of the requests. Claimant responded, expressing his disbelief as to employer’s assertions.

The administrative law judge quashed the subpoena in part; he denied the motion to quash in regard to Mr. Keith’s attendance at the hearing. Employer filed a motion for reconsideration, stating that Mr. Keith last supervised claimant on February 6, 1996, at which time the company locked out its employees. In a notarized statement attached to employer’s motion to reconsider, Mr. Keith attested that he has no relevant knowledge concerning claimant’s discrimination claim. Mr. Keith also attested that he had moved to a different part of the state. A conference call was held on employer’s motion to reconsider, after which the administrative law judge issued an order quashing the subpoena of Mr. Keith in its entirety. The administrative law judge stated that Mr. Keith has no relevant information and claimant failed to demonstrate otherwise.

We affirm the administrative law judge’s quashing of the subpoena of Mr. Keith. The administrative law judge properly relied on Mr. Keith’s affidavit attesting that he has no relevant information. Moreover, following a conference call, the administrative law judge additionally was satisfied that the information claimant wanted from Mr. Keith was not relevant, nor did Mr. Keith have any knowledge of employment decisions concerning claimant. The administrative law judge need admit only relevant and material evidence into the record. *See Olsen v. Triple A Machine Shop*, 25 BRBS 40 (1991), *aff’d mem. sub nom. Olsen v. Director, OWCP*, 996 F.2d 1226 (9th Cir. 1993); 20 C.F.R. §702.338; 29

C.F.R. §18.14(a). As the Board reviews these discovery matters under an abuse of discretion standard, and no abuse is apparent on the record before us, we affirm the quashing of the subpoena of Mr. Keith. *See Stark v. Washington Star Co.*, 833 F.2d 1025, 20 BRBS 40(CRT) (D.C. Cir. 1987).

Andrew Schreck: claimant requested, *inter alia*, the work records of Karen Grimm, a nurse for employer; copies of controversions filed with the district director; copies of all documents filed with the district director, the administrative law judge, and the BRB; various medical reports; and documents verifying delivery of previously subpoenaed items. Employer filed a motion to quash on the grounds that Mr. Schreck is not a party to the proceedings, and because the document requests are overly broad and “are not reasonably calculated to lead to the discovery of relevant evidence” regarding the alleged discrimination. Claimant responded that Mr. Schreck was the “perpetrator” of “many felonious” actions and that he has relevant documents which he would not turn over to claimant.

The administrative law judge granted the motion to quash. He stated that claimant failed to demonstrate how the requested documents pertain to the Section 49 claim. With regard to calling Mr. Schreck as a witness, the administrative law judge rejected Mr. Schreck’s contention that a party’s attorney can never be a witness, but he also determined that claimant failed to demonstrate that Mr. Schreck was involved in any employment decisions concerning claimant and that claimant’s general assertions of fraud and abuse are insufficient to warrant enforcement of the subpoena.

We affirm this finding, as the administrative law judge did not abuse his discretion in finding that Mr. Schreck was not a proper witness in this case and that the documents requested are not relevant. *See Stark*, 833 F.2d 1025, 20 BRBS 40(CRT); *Olsen*, 25 BRBS 40. To the extent that claimant was seeking documents relating to his disability claim, we note that Administrative Law Judge Kennington found, in his decision on the disability claim, that employer provided claimant access to all relevant documents, a finding the Board affirmed on appeal. *Dodd*, 36 BRBS at 87.

INTERROGATORIES

Claimant served interrogatories on Mr. Schreck, and Mr. Schreck filed a motion for a protective order, pursuant to 29 C.F.R. §18.15, on the ground that he is not a “party,” and therefore under 29 C.F.R. §18.18, he cannot be served with interrogatories. The administrative law judge granted the motion for the protective order.

We affirm this finding. The regulations governing the practice and procedure before the Office of Administrative Law Judges provide that, “Any party may serve upon any other party written interrogatories. . . .” 29 C.F.R. §18.18. Thus, as Mr. Schreck is

not a party, the administrative law judge properly denied the request that Mr. Schreck answer interrogatories.

RECUSAL OF ADMINISTRATIVE LAW JUDGE

Claimant filed a motion that the administrative law judge recuse himself because the administrative law judge denied claimant's discovery requests, denied the motion to remove Mr. Schreck as employer's attorney, and refused claimant's request to define the scope of the Section 49 proceeding in his Order Denying Request for Legal Advice. The administrative law judge denied the motion to recuse at the hearing. Tr. at 6.

We affirm the administrative law judge's decision that he need not recuse himself. Section 556(b) of the Administrative Procedure Act provides in pertinent part:

The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

5 U.S.C. §556(b); *see also* 29 C.F.R. §18.31. Although claimant timely sought the administrative law judge's recusal,⁶ *see Codd v. Stevedoring Services of America*, 32 BRBS 143 (1998), it is not apparent that he filed an affidavit in support of his motion. Moreover, adverse rulings alone are an insufficient basis on which to establish that the administrative law judge is not impartial or is biased. *See Orange v. Island Creek Coal Co.*, 786 F.2d 724 (6th Cir. 1986). In this case, claimant's motion for recusal was based on the administrative law judge's quashing of the subpoenas and his refusal to remove Mr. Schreck. As these adverse rulings cannot support a finding that the administrative law judge was required to recuse himself, we reject claimant's contention of error.

⁶The general rule governing disqualification of both federal judges and agency employees requires that such a request be raised as soon as practicable after a party has reasonable cause to believe that grounds for disqualification exist. *Marcus v. Director, OWCP*, 548 F.2d 1044 (D.C. Cir. 1976).

ORDER OF DISMISSAL

The administrative law judge did not state under what authority he was dismissing claimant's claim. 29 C.F.R. §18.39(b) states that:

A request for hearing may be dismissed upon its abandonment or settlement by the party or parties who filed it. *A party shall be deemed to have abandoned a request for hearing if neither the party nor his or her representative appears at the time and place fixed for the hearing* and either (a) prior to the time for hearing such party does not show good cause as to why neither he or she nor his or her representative can appear or (b) within ten (10) days after the mailing of a notice to him or her by the administrative law judge to show cause, such party does not show good cause for failure to appear and fails to notify the administrative law judge prior to the time fixed for hearing that he or she cannot appear. A default decision, under Sec. 18.5(b), may be entered against any party failing, without good cause, to appear at a hearing.

29 C.F.R. §18.39(b) (emphasis added). The administrative law judge's authority to dismiss a claim with prejudice due to abandonment, pursuant to 29 C.F.R. §18.39(b), 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 any appropriate action authorized by the Federal Rules of Civil Procedure. Rule 41(b), Fed. R. Civ. P. 41(b), provides for the involuntary dismissal of a claim for, *inter alia*, failure to prosecute the claim. The Fifth Circuit, within whose jurisdiction the instant case arises, applies an abuse of discretion standard to rulings made pursuant to Rule 41(b).⁷ *Dorsey v. Scott Wetzel Services, Inc.*, 84 F.3d 170 (5th Cir. 1996). Due to claimant's statement to the administrative law judge, which he reiterates on appeal, that he will not participate in a hearing before this administrative law judge and the fact of his non-appearance, we hold that the administrative law judge was not required to evaluate claimant's overall conduct, but acted within his discretion in dismissing the claim with prejudice due to abandonment

⁷The courts have interpreted this rule as permitting a case's dismissal only where there is a clear record of delay or contumacious conduct, or when less drastic sanctions have proved unsuccessful. *See Dorsey v. Scott Wetzel Services, Inc.*, 84 F.3d 170 (5th Cir. 1996); *see also Penny Theatre Corp. v. Plitt Theatres, Inc.*, 812 F.2d 337 (7th Cir. 1987); *Donnelly v. Johns Manville Sales Corp.*, 677 F.2d 339 (3^d Cir. 1982); *Davis v. Williams*, 588 F.2d 69 (4th Cir. 1978); *Twigg v. Maryland Shipbuilding & Dry Dock Co.*, 23 BRBS 118 (1989).

pursuant to Section 18.39(b). *See generally Harrison v. Barrett Smith, Inc.*, 24 BRBS 257 (1991), *aff'd mem. sub nom. Harrison v. Rogers*, No. 92-1250 (D.C. Cir. March 19, 1993); *Taylor v. B. Frank Joy Co.*, 22 BRBS 408 (1989).

Accordingly, the administrative law judge's interlocutory orders and his Order of Dismissal are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge