



BRB No. 18-0202

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| FLOYD A. RICKS, JR. |) | |
| |) | |
| Claimant-Petitioner |) | |
| |) | |
| v. |) | |
| |) | |
| CP&O, LLC |) | |
| |) | DATE ISSUED: <u>July 18, 2018</u> |
| and |) | |
| |) | |
| PORTS INSURANCE COMPANY, |) | |
| INCORPORATED |) | |
| |) | |
| Employer/Carrier- |) | |
| Respondents |) | DECISION and ORDER |

Appeal of the Order Not Approving Lay Representative and the Order Denying Request to Reenter Initial Appearance as Lay Representative of Dana Rosen, Administrative Law Judge, United States Department of Labor.

Lamarr Brown, Princess Anne, Maryland, lay representative, for claimant.

Christopher R. Hedrick (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, ROLFE and GILLIGAN, administrative appeals judges.

PER CURIAM:

Claimant appeals the Order Not Approving Lay Representative and the Order Denying Request to Reenter Initial Appearance as Lay Representative (2017-LHC-01364) of Administrative Law Judge Dana Rosen 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 will review the administrative law judge's Orders for

abuse of discretion and compliance with law. *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009).

On December 29, 2016, claimant filed a claim under the Act, alleging that he sustained injuries to his left and right knees while working for employer on September 20, 2015. On July 25, 2017, Lamarr Brown, a lay representative, submitted a letter to the administrative law judge requesting approval to serve as claimant's lay representative in the proceedings before the Office of Administrative Law Judges (OALJ). Specifically, Mr. Brown stated:

I Lamarr Brown would like to enter my initial appearance in the above-captioned cases [sic] on behalf of [claimant]. This is in accordance with the Code of Federal Regulations Title 29 §(a)(2) [sic]. I have familiarized myself with the rules and procedures of the U.S. Department of Labor's Office of Administrative Law Judges at this level as well as having represented claimants in Social Security cases before U.S. Administrative Law Judges.

I am confident that the elements showing my initiatives to fully represent [claimant] satisfies the qualifications necessitated for me to proceed with [claimant]'s proper legal representation at this level.

Brown Corr. (July 25, 2017). On this same date, claimant submitted a letter to the administrative law judge, stating that he wished to be represented by Mr. Brown. Cl. Corr. (July 25, 2017). The administrative law judge addressed Mr. Brown's request in an Order Not Approving Lay Representative, which was issued on July 28, 2017. Citing Section 18.22(b)(2) of the Rules of Practice and Procedure for the Office of Administrative Law Judges (OALJ Rules),¹ the administrative law judge observed that she may require a lay

¹ Section 18.22(b)(2) of the OALJ Rules states in relevant part:

Non-attorney representative. An individual who is not an attorney [] may represent a party [] upon the judge's approval. The individual must file a written request to serve as a non-attorney representative that sets forth the name of the party [] represented and certifies that the party [] desires the representation. The judge may require that the representative establish that he or she is subject to the laws of the United States and possesses communication skills, knowledge, character, thoroughness and preparation reasonably necessary to render appropriate assistance. The judge may inquire as to the qualification or ability of a non-attorney representative to render assistance at any time. The judge may deny the request to serve as non-attorney representative after providing the party or subpoenaed witness with notice and an opportunity to be heard.

representative to establish his ability to render appropriate assistance. The administrative law judge denied Mr. Brown's request to serve as claimant's lay representative, summarily finding that, based on his July 25 letter, "Mr. Brown has not demonstrated sufficient knowledge and qualifications to represent the Claimant under the Longshore Act." Order at 2 (July 28, 2017).

On August 2, 2017, Mr. Brown submitted another letter to the administrative law judge, again requesting that she allow him to represent claimant in this case. In so doing, Mr. Brown apologized for the incorrect citation to the applicable regulation contained in his initial request and stated that, he "would like to re-enter my initial appearance in the above-captioned cases [sic] . . . in accordance with the Code of Federal Regulations Title 29 §18(b)(2)." Brown Corr. (Aug. 2, 2017). On August 8, 2017, the administrative law judge issued an Order Denying Request to Reenter Initial Appearance as Lay Representative. The administrative law judge acknowledged that Mr. Brown had remedied the citation error contained in his first request; however, she again denied his request, stating that "[b]ased on the above second request, the court determines that Mr. Brown has not demonstrated sufficient knowledge and qualifications to represent the Claimant under the Longshore Act." Order at 2 (Aug. 8, 2017).

On February 1, 2018, claimant, without representation, appealed the administrative law judge's Orders declining to approve Mr. Brown as his lay representative. On February 27, 2018, Mr. Brown made application to appear and represent claimant in the proceedings before the Board.² Employer responds, contending the administrative law judge properly denied Mr. Brown's request.³

29 C.F.R. §18.22(b)(2). The OALJ Rules apply in proceedings under the Act to the extent they are not inconsistent with either the Act itself or the Act's regulations. 29 C.F.R. §18.10(a).

² We grant this request. 20 C.F.R. §802.202(d)(2).

³ Subsequent to the issuance of the disqualification orders, employer filed a Motion for Partial Summary Decision on November 3, 2017, asserting claimant's claim was untimely. Claimant moved for a continuance on November 13, 2017, stating that he sought, but was unable to obtain, other representation. On November 14, 2017, the administrative law judge granted the continuance and ordered claimant to provide a written status report by December 15, 2017, informing her whether he intended to withdraw his claim or proceed with a hearing. If claimant chose to proceed to hearing, he was additionally ordered to inform the administrative law judge if he was going to represent himself or obtain another representative. On January 2, 2018, claimant requested an extension of time to respond to employer's motion, and the administrative law judge

Claimant's appeal is of a non-final, or interlocutory, order. The Board ordinarily does not undertake review of non-final orders. *See, e.g., Newton v. P & O Ports Louisiana, Inc.*, 38 BRBS 23 (2004); *Tignor v. Newport News Shipbuilding & Dry Dock Co.*, 29 BRBS 135 (1995). The United States Supreme Court has articulated a three-pronged test to determine whether an order that does not finally resolve litigation is nonetheless appealable. First, the order must conclusively determine the disputed question. Second, the order must resolve an important issue which is completely separate from the merits of the action. Third, the order must be effectively unreviewable on appeal from a final judgment. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988) (collateral order doctrine). If the order at issue fails to satisfy any one of these requirements, it is not appealable. *Id.* at 276. While the Board is not bound by the formal or technical rules of procedure governing litigation in federal courts, *see* 33 U.S.C. §923(a), it has relied on such rules for guidance where the Act and its regulations are silent. *See generally Sprague v. Director, OWCP*, 688 F.2d 862, 869 n.16, 15 BRBS 11, 21 n.16(CRT) (1st Cir. 1982). Thus, where the appealed order does not satisfy the three-prong test, the Board ordinarily will not grant interlocutory review, unless, in its discretion, the Board finds it necessary to direct the course of the adjudicatory process. *See Pensado v. L-3 Communications Corp.*, 48 BRBS 37 (2014); *Baroumes v. Eagle Marine Services*, 23 BRBS 80 (1989).

The administrative law judge's procedural orders do not satisfy the three-prong test of the collateral order doctrine. Although the order conclusively determined Mr. Brown's capacity to serve as claimant's lay representative in this case, and this issue is collateral to the merits of the claim, the order is not unreviewable at a later date as claimant may challenge the administrative law judge's procedural ruling after a decision on the merits has been issued and any error may be addressed. *See Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994); *see generally Richardson Merrell, Inc. v. Koller*, 472 U.S. 424 (1985) (disqualification of attorney-representative in civil case is not appealable on an interlocutory basis); *Flanagan v. United States*, 465 U.S. 259 (1984). Nonetheless, we will entertain claimant's appeal at this time to direct the course of the adjudicatory process. *See, e.g., Pensado*, 48 BRBS 37; *Baroumes*, 23 BRBS 80. We review an administrative law judge's procedural orders for an abuse of discretion and

granted claimant's request on January 9, 2018. Claimant did not subsequently respond to employer's motion. Thus, on February 6, 2018, the administrative law judge granted employer's motion for partial summary decision, finding that employer's summary of the facts "are deemed undisputed" under 29 C.F.R. §18.72(e)(2) and Federal Rule of Civil Procedure 56(e)(2).

By Order issued on March 1, 2018, the administrative law judge stayed further proceedings until the Board issues a decision on claimant's interlocutory appeal.

compliance with law. *See generally Armani v. Global Linguist Solutions*, 46 BRBS 63 (2012); *Jackson v. Universal Maritime Service Corp.*, 31 BRBS 103 (1997) (Brown, J., concurring); *Tignor*, 29 BRBS 135; *Duran v. Interport Maint. Corp.*, 27 BRBS 8 (1993).

We hold that the administrative law judge's orders do not comply with the requirements of the Administrative Procedure Act, 5 U.S.C. §557(C)(3)(A) (the APA), as she failed to explain why she found Mr. Brown's knowledge and qualifications insufficient to appropriately assist claimant in this case. The APA requires an administrative law judge to state her "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or *discretion* presented on the record." 5 U.S.C. §557(c)(3)(A) (emphasis added); *see generally Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996); *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990). Although the administrative law judge is afforded broad discretion in the conduct of pre-hearing matters and may deny a request to serve as a lay representative, 29 C.F.R. §§18.12, 18.22(b)(2), 18.43; *see also* 5 U.S.C. §554 *et seq.*; *Butler v. Ingalls Shipbuilding, Inc.*, 28 BRBS 114 (1994); *Durham v. Embassy Dairy*, 19 BRBS 105 (1986), she was required to set forth the reasons for finding that Mr. Brown did not establish he possesses the knowledge and qualifications necessary to represent claimant in this case.⁴ Further, the administrative law judge's omission may be of no small significance as the Act's implementing regulations specifically permit parties to a claim to present their case with the assistance of a lay representative, 20 C.F.R. §702.131(a),⁵ and the administrative law judge's disqualification of Mr. Brown effectively compelled claimant to pursue his claim without representation.⁶

⁴ Mr. Brown's requests to serve as claimant's lay representative state the purpose of the correspondence, citing the Code of Federal Regulations, reference Mr. Brown's prior experience representing claimants before the Social Security Administration, and additionally indicate that Mr. Brown familiarized himself with the rules of practice and procedure before the OALJ.

⁵ Section 702.131(a) of the Act's regulations states:

Claimants, employers and insurance carriers may be represented in any proceeding under the Act by an attorney or other person previously authorized in writing by such claimant, employer or carrier to so act.

20 C.F.R. §701.131(a).

⁶ In her appellate brief, claimant states that her prior attorney declined to pursue her claim for modification. Cl. Br. at 2. Further, the administrative law judge's "Order Staying Proceedings Pending Claimant's Benefits Review Board Interlocutory Appeal" notes that claimant responded to the Order to Show Cause, stating that Mr. Brown was not allowed

Consequently, we vacate the administrative law judge's disqualification of Mr. Brown and remand the case for her to reconsider this issue. On remand, the administrative law judge must reconsider Mr. Brown's request to serve as claimant's lay representative. If she again finds Mr. Brown has not established that he possesses the qualifications reasonably necessary to represent claimant in proceedings under the Act, she must explain her finding in accordance with the APA.

Accordingly, the administrative law judge's Order Not Approving Lay Representative and the Order Denying Request to Reenter Initial Appearance as Lay Representative are vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

to represent her and that she would proceed without representation because neither of her former counsel acknowledged a viable claim. Order at 3 (Mar. 1, 2018).