U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 22-0291

JOSHUA J. ALBERT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MARINETTE MARINE CORPORATION	)	
	)	
and	)	DATE ISSUED: 8/16/2023
	)	
SENTRY INSURANCE A MUTUAL COMPANY c/o SENTRY CLAIMS SERVICE	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Order of Dismissal and Order Denying Reconsideration of Heather C. Leslie, Administrative Law Judge, United States Department of Labor.

Holly Lutz (Law Offices of Holly Lutz, LLC), Wausau, Wisconsin, for Claimant.

Andrew Z. Schreck (Downs Stanford, P.C.), Sugar Land, Texas, for Employer.

Before: GRESH, Chief Administrative Appeals Judge, BUZZARD and JONES, Administrative Appeals Judges.

GRESH, Chief Administrative Appeals Judge, and BUZZARD, Administrative Appeals Judge:

Claimant appeals Administrative Law Judge (ALJ) Heather C. Leslie's Order of Dismissal and Order Denying Reconsideration (2018-LHC-00728) rendered on a claim

filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (Act). We review the ALJ's dismissal of Claimant's claim under the abuse of discretion standard. *See*, *e.g.*, *Goforth v. Owens*, 766 F.2d 1533 (11th Cir. 1985); *Taylor v. B. Frank Joy*, *Co.*, 22 BRBS 408 (1989).[1]

Claimant filed a claim under the Act seeking benefits for an alleged work-related right knee injury. The case was forwarded to the Office of Administrative Law Judges (OALJ) and initially assigned to ALJ Carrie Bland, who, by notice dated June 29, 2018, informed the parties that a hearing was scheduled for November 6, 2018, in Madison, Wisconsin. On October 22, 2018, Claimant filed a motion for an extension of time to file exhibits, for a continuance in favor of first allowing his concurrent state workers' compensation hearing to go forward, and for a change in the hearing location from Madison, Wisconsin, because it is not within seventy-five miles of his residence as required by 20 C.F.R. §702.337(a). By order dated October 26, 2018, ALJ Bland granted Claimant's motion for a continuance, cancelled the November 2018 hearing, and instructed the parties "to provide, separately, a list of dates from December 2018 to April 2019 in which they are unavailable, after which the hearing will be rescheduled in Green Bay, Wisconsin."

Claimant's counsel, by letter to ALJ Bland dated November 5, 2018, provided the requested dates she and Claimant were unavailable from December 2018 through May 2019. Again, Claimant's counsel informed ALJ Bland of Claimant's upcoming state workers' compensation hearing, scheduled for November 13, 2018, which "may affect" the parties' preferences in terms of the adjudication of his claim under the Act. She further stated the additional time to await a hearing in his federal claim would enable Claimant to obtain a recommended consultation with a sports medicine specialist "which will further inform the record regarding the nature of his knee injury." It appears that for various reasons no further action was taken by ALJ Bland on Claimant's claim until June 22, 2021, when Claimant's counsel purportedly engaged in a phone conference with an attorney from ALJ Bland's office. In that discussion, counsel stated Claimant was not requesting a hearing at that time because updates to the case file were needed. CX A.

On July 28, 2021, ALJ Heather C. Leslie (the ALJ) issued a pre-hearing order informing the parties of the case's reassignment to her. The order set a hearing for February

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[1] This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit because the injury occurred in Wisconsin. 33 U.S.C. §921(c); *see Roberts v. Custom Ship Interiors*, 35 BRBS 65, 67 n.2 (2001), *aff'd*, 300 F.3d 510, 36 BRBS 51(CRT) (4th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003); 20 C.F.R. §702.201(a).

21, 2022, in Madison, Wisconsin, the same location Claimant had successfully objected to when the case was before ALJ Bland due to its distance from his home. The order also outlined various adjudicatory deadlines, including a deadline for the submission of a joint pre-hearing statement at least 21 days before the hearing, and articulated the "consequences," including the dismissal of the claim, for failing to comply with the order. On January 20, 2022, the ALJ issued an Amended Scheduling Order notifying the parties of a format change for the February 2022 hearing from "in-person" to video "[d]ue to a recent rise in COVID-19 cases." On January 28, 2022, the parties filed with the ALJ an "Agreed Motion for Continuance" seeking postponement of the February 2022 video hearing and proposing alternative hearing dates of July 19, 20, or 21, 2022.

Nevertheless, on February 1, 2022, the ALJ, stating she had not yet received any response from the parties, issued a show cause order directing them to articulate, within fourteen days, why the claim should not be dismissed for failure to abide by her July 28, 2021 pre-hearing order. The parties each responded on February 14, 2022. Employer noted it would discuss settlement with Claimant's counsel. Claimant again requested a continuance of the February 21, 2022 hearing due to delays she was experiencing relating to the COVID-19 pandemic and Claimant's and counsel's unavailability on the scheduled hearing date. Claimant's counsel also advised the ALJ that Claimant had previously filed an LS-18 pre-hearing statement with ALJ Bland on February 22, 2018, and would file an updated statement as soon as possible. Claimant's counsel informed the ALJ that her law office "has not yet fully reopened [from the pandemic], but we are doing our best to be able to respond to necessary orders and pleadings, as we rebuild toward being able to increase virtual participation."

On February 17, 2022, the ALJ issued an order granting a continuance,[2] cancelling the February 21, 2022 hearing, and ordering that by Thursday, March 3, 2022, the parties "provide [her] with a proposed scheduling order outlining the dates for discovery, submission of the pre-hearing statement, motions, exchange of exhibits and any other dates the parties deem necessary as well as three dates for the hearing to occur." She further stated, "Failure to provide the proposed scheduling order by March 3, 2022 will result in the Claimant's case being DISMISSED." ALJ Order dated Feb. 17, 2022, at 3. On March 7, 2022, two business days after the deadline, the ALJ issued an order dismissing the case because "[a] review of the administrative file reveals that a proposed scheduling order was not filed on March 3, 2022." The ALJ denied Claimant's motion for reconsideration on March 18, 2022.

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[2] Although "sympathetic to the unexpected issues" relating to COVID-19 in granting Claimant's request, the ALJ informed the parties, "I am not willing to allow the case to linger anymore without some resolution in sight."

On appeal, Claimant challenges the ALJ's decision to dismiss his claim.[3] He contends the ALJ's decision is erroneous because it is based on mistaken assumptions, inaccurate information, and an incomplete understanding of the circumstances adversely impacting the parties' efforts to provide Claimant the opportunity to present his case on the merits. Additionally, he states the ALJ's orders reflect an abuse of discretion as she failed to consider, prior to dismissal, whether lesser sanctions would better serve the interests of justice. He maintains the ALJ's dismissal of the claim results in manifest injustice, particularly when alternative actions were available. As requested in his motion for reconsideration, Claimant again asserts remand to the district director is more appropriate given that new issues have developed since the claim was originally forwarded to the OALJ.

ALJ's Orders

As previously noted, the ALJ issued an order on February 17, 2022, for the parties to produce "a proposed scheduling order" by March 3, 2022. Two business days after that deadline, on March 7, 2022, the ALJ dismissed the claim because neither party had yet responded. In reaching that resolution, the ALJ emphasized she had given the parties notice that failure to provide the information by the stated deadline would result in dismissal of Claimant's case. ALJ Order dated Feb. 17, 2022, at 3. On reconsideration, the ALJ reviewed the procedural history of the case before the OALJ. Included in her review was a consideration of the parties' February 14, 2022 responses to her February 1,

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[3] Claimant filed his petition for review and accompanying brief with the Board on July 18, 2022. More than eleven months later, on June 27, 2023, Employer submitted a motion for an extension of time to file its response brief on the basis that it had "not received any communications from the Board regarding this matter." Contrary to Employer's contention, the Board's acknowledgement order, dated June 2, 2022, indicates the Board served that order on Employer's counsel at the address listed in his June 2023 motion for extension of time and the Notice of Representation he filed with the Board on March 4, 2023. Moreover, Employer's motion for extension does not allege its counsel was unaware of Claimant's appeal or the filing of his petition for review and brief which, itself, includes a service sheet indicating Claimant's counsel served that document on Employer's counsel on July 18, 2022. Accordingly, we deny as untimely Employer's motion for an extension of time, as well as its July 11, 2023 response brief, as both were filed more than eleven months after Claimant's brief – well beyond the 30-day timeframe for responding to Claimant's petition for review and brief. 20 C.F.R. §§802.210, 802.211(c), 802.212(a).

2022 Order to Show Cause[4] and her subsequent February 17, 2022 order cancelling the February 21, 2022 hearing and ordering the parties "to provide a proposed scheduling order." The ALJ reiterated that "[n]either party responded" to her February 17, 2022 order despite her warning them of the consequences.

Next, the ALJ set out Claimant's motion for reconsideration, stating his counsel previously raised arguments that the pandemic had negatively impacted her law practice, her practice had not yet fully reopened, and she had not anticipated the issuance of the overly harsh sanction of dismissal. The ALJ found her February 17 order stressed the importance of moving forward with the case[5] and articulated the consequences for failing to respond by March 3, 2022. Stating "[i]t is incumbent upon counsel, as an advocate for the Claimant, to timely respond to court orders and not ignore them outright," the ALJ informed counsel that the "best choice"[6] in this case would have been to submit, either in conjunction with Employer or separately, "a proposed scheduling order pursuant to the

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[4] Employer apologized "for not asking the Court for an abatement of this case while the Claimant's Wisconsin state case was being resolved," stated the state workers' compensation claim had settled, and that it "will obtain information about that settlement and share with [Claimant's counsel] to evaluate if the longshore claim (scheduled injury to a knee) may also be resolved." CX J. Claimant's counsel requested a continuance because the pandemic had hindered her ability to manage and prepare for hearings and neither she nor Claimant were available to attend the February 21, 2022 hearing as scheduled. CX I. At that time, counsel stated she "will advise OALJ further when it is appropriate to proceed with scheduling a hearing." *Id.*

[5] The ALJ stated that in her February 17 order, she informed the parties:

> [T]his case has been at OALJ for over 4 years, including a 3.5 year period where no communication was received from the parties. The undersigned is tasked to either reject or award the claim in a timely manner. Thus, while I will grant Claimant's request for a continuance as it is clear the parties are not ready for a hearing, I am not willing to allow the case to linger anymore without some resolution in sight.

[6] The ALJ's admonition is a response to Claimant's counsel's suggestion that "spending time trying to agree on joint deadlines within the next six months that we will most likely be unable to meet for a case that is unlikely to be ready on that timeline anyway is not the best choice" for the use of her time. As discussed below, *see* n. 16 *infra*, the ALJ did not address counsel's statement in its proper context, nor does our dissenting colleague.

Order outlining the necessary dates or at the very least communicated with the court in some way by March 3, 2022." She therefore denied Claimant's motion for reconsideration.

Applicable Law and Analysis

The Rules of Practice and Procedure for Administrative Hearings Before the OALJ (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) (2016). Section 18.10(a) states, "[t]he Federal Rules of Civil Procedure (FRCP) apply in any situation not provided for or controlled by these rules, or a governing statute, regulation, or executive order." Neither the Act, its implementing regulations, nor the OALJ Rules specifically address the ALJ's authority to dismiss a claim based on a party's alleged failure to prosecute it in the pre-hearing phase. *But see* 29 C.F.R. §18.12(b)(7) (generally setting forth the ALJ's "powers necessary to conduct fair and impartial proceedings," including the authority to "[t]erminate proceedings through dismissal . . . when not inconsistent with statute, regulation, or executive order"); 29 C.F.R. §18.21(c) (ALJ may, "after notice and an opportunity to be heard, dismiss the proceeding or enter a decision and order without further proceedings if the party fails to establish good cause for its failure to appear" at the scheduled hearing); 29 C.F.R. §18.57(b)(1)(v) (ALJ may, upon a party's failure to comply with a judge's discovery order, "issue further just orders" which may include "[d]ismissing the proceeding in whole or in part").

Federal Rule of Civil Procedure 41(b), on the other hand, does specifically address involuntary dismissal and allows the adjudicator to dismiss a claim for, among other things, failure to prosecute or comply with a court order. Fed. R. Civ. P. 41(b);[7] *see also* 29 C.F.R. §18.10(a); *Taylor*, 22 BRBS 408 (1989) (ALJ may look to the FRCP when the Act, its implementing regulations, and the OALJ Rules are silent on the matter at hand).[8]

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[7] Rule 41(b) states:

> If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule - except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19 - operates as an adjudication on the merits.

[8] In *Taylor*, the Board affirmed the ALJ's dismissal of an ongoing request for a hearing because neither the claimant nor his attorney appeared at the originally scheduled hearing, it was unclear who had requested the hearing, and the claimant's counsel had been unable to locate the claimant for at least five months. Given the procedural history of the

The Board has held that dismissal of a claim for failure to prosecute under Rule 41(b) is permitted "only where there is a clear record of delay or contumacious conduct, or where less drastic sanctions have proved unsuccessful, such as where the [claimant] willfully disobeyed a court order or has persistently failed to prosecute his claim." *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), *cert. denied*, 510 U.S. 1053 (1994) (ALJ did not abuse his discretion in dismissing claims with prejudice based on the claimant's repeated and numerous abuses of the administrative process over the entire course of the case including his refusal to comply with discovery requests and submit to a medical examination). The Board further cautioned that an ALJ may not dismiss a claim unless "a clear record of intentional conduct [is] shown" and even then, she must first consider "whether lesser sanctions would serve the interests of justice or . . . have proven unavailing." *Id.* at 261.

Likewise, federal courts have consistently held that dismissal "is an extraordinarily harsh sanction that should be used only in extreme situations." *Kasalo v. Harris & Harris, Ltd.*, 656 F.3d 557, 561 (7th Cir. 2011); *see also Lewis v. Rawson*, 564 F.3d 569, 576 (2d Cir. 2009) (dismissal is a "harsh remedy" that should be "utilized only in extreme situations"); *Ferdik v. Bonzelet*, 963 F.2d 1258, 160 (9th Cir. 1992) ("dismissal is a harsh penalty and, therefore, it should only be imposed in extreme circumstances"); *Pardee v. Stock*, 712 F.2d 1290, 1292 (8th Cir. 1983) (dismissal under Rule 41(b) is an extremely harsh and "drastic sanction which should be exercised sparingly"); *Rogers v. Kroger Co.*, 669 F.2d 317, 321 (5th Cir. 1982) (dismissal is an extreme sanction to be used only when the "plaintiff's conduct has threatened the integrity of the judicial process [in a way which] leav[es] the court no choice but to deny that plaintiff its benefits"); *Reizakis v. Loy*, 490 F.2d 1132, 1135 (4th Cir. 1974) (dismissal is a harsh sanction which should not be invoked lightly).

In this regard, the United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this claim arises, stated in *Gabriel v. Hamlin*, 514 F.3d 734, 736 (7th 2008), that dismissal "should be used only in extreme situations, when there is a clear record of delay or contumacious conduct, or where other less drastic sanctions have proven unavailing." "The appropriateness of this measure depends on all the circumstances of the case," *Kasalo*, 656 F.3d at 561, and "[a] court reviewing the dismissal of an action or claim must consider the procedural history of the case as well as the status of the case at the time of dismissal." *Roland v. Salem Cont. Carriers, Inc.*, 811 F.2d 1175, 1177 (7th Cir. 1987).

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case and citing Rule 41(b)'s provision authorizing dismissal for failure to prosecute, the Board held the ALJ did not err in, effectively, dismissing the claim as abandoned pursuant to 29 C.F.R. §18.39(b) (amended 2015) and FRCP 41(b). *Taylor*, 22 BRBS at 411-412.

Further, when reviewing a dismissal under an abuse of discretion standard, the Seventh Circuit looks to whether the court, in dismissing the claim, considered the "essential factor[s]," which "include the plaintiff's pattern of and personal responsibility for violating orders, the prejudice to others from that noncompliance, the possible efficacy of lesser sanctions, and any demonstrated merit to the suit." *Pendell v. City of Peoria*, 799 F.3d 916, 918 (7th Cir. 2015); *Kasalo*, 656 F.3d at 562; *Gabriel*, 514 F.3d at 737; *Kruger v. Apfel*, 214 F.3d 784, 786-87 (7th Cir. 2000).[9] Relatedly, in *Twigg v. Maryland Shipbuilding & Dry Dock Co.*, 23 BRBS 118, 122 (1989), the Board vacated an ALJ's dismissal because he did not consider "the propriety of dismissal" in light of relevant factors, including: 1) the degree of personal responsibility on the part of the claimant; 2) the amount of prejudice to the employer caused by the delay; 3) the presence/absence of a drawn-out history of deliberately proceeding in a dilatory fashion; and 4) the effectiveness of sanctions less drastic than dismissal. *Twigg*, 23 BRBS at 122; *see also French v. California Stevedore & Ballast*, 27 BRBS 1, 4 n.5 (1993).

We hold the circumstances of this case and case precedent mandate the conclusion that the ALJ's dismissal of Claimant's claim with prejudice is too extreme an action at this juncture.

First, as Claimant maintains, the ALJ's consideration of the circumstances is incomplete as her various orders contain at least one significant inaccuracy and neglect other relevant information in the record. In her February 1, 2022 Order to Show Cause, the ALJ stated, "[a] review of the administrative record reveals no communication from either party since November of 2018." ALJ Order dated Feb. 1, 2022, at 2 n.2. However, the record reflects Claimant's counsel engaged in a case status phone call with ALJ Bland's

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[9] Similarly, in *Ball v. City of Chicago*, 2 F.3d 752, 759-60 (7th Cir. 1993), the Seventh Circuit stated:

> [T]he decision whether to dismiss a suit for failure to prosecute should, ideally, take full and careful account of the frequency and magnitude of the plaintiff's failures to comply with deadlines for the prosecution of the suit, the apportionment of responsibility for those failures between the plaintiff and his counsel and therefore the appropriateness of sanctioning the plaintiff's lawyer rather than the plaintiff, the effect of the failures in taxing the judge's time and disrupting the judge's calendar to the prejudice of other litigants, the prejudice if any to the defendant from the plaintiff's dilatory conduct, the probable merits of the suit, and (what is closely related) the consequences of dismissal for the social objectives of the type of litigation that the suit represents.

law clerk on June 22, 2021,[10] CX A, and Employer, on behalf of the parties, filed an agreed motion for continuance with the OALJ on January 28, 2022, proposing alternative hearing dates. CX G. In her June 2021 phone conversation, Claimant's counsel represents she informed the OALJ that "this case is not ready" yet for a hearing "as updates [are] needed," she was "[n]ot requesting [a] hearing at [that] time," and she intended to meet with Claimant in September 2021 to discuss his claim. CX A. Additionally, in its January 2022 correspondence, Employer, with Claimant's consent, requested the "case be postponed and continued to a later date" due to the parties' unavailability and for them "to see if a resolution may be reached."[11] CX G. Upon conferring with Claimant's attorney, Employer asked for a formal hearing date of July 19, 20, or 21, 2022. *Id.* Claimant also states his LS-18 was filed with the OALJ on February 22, 2018, and he notified the ALJ of that filing and intent to update it, in his response to her February 1, 2022 show cause order. CX A, I.

In dismissing the claim two days after the parties failed to meet her March 3, 2022 scheduling deadline, the ALJ did not consider this evidence which provides information regarding the parties' agreement in terms of proceeding with the claim (that the case was not yet ripe for the ALJ to conduct a formal hearing), and indicates ongoing participation in the claim including responses to the ALJ's July 28, 2021 and February 1, 2022 orders.[12]

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[10] This also contradicts the ALJ's statement, in her March 18, 2022 order denying Claimant's motion for reconsideration, that ALJ Bland issued an order cancelling/continuing the hearing in October 2018 and that "[n]o further communication was forthcoming from the parties" from that point until after she issued her July 28, 2021 notice of assignment.

[11] Moreover, as Claimant contends, there is evidence Employer did not become aware of the ALJ's July 28, 2021 order until January 2022, when it filed its joint motion for a continuance with Claimant. In this regard, the corresponding service sheet for the order lists an incorrect email address for Employer's counsel and indicates service was done electronically via regular email. CX F. It is unclear whether that document was also served via regular mail.

[12] It also appears the ALJ, in initially setting the hearing to be held in Madison, Wisconsin, was either unaware of or, without explanation, disregarded ALJ Bland's October 26, 2018 order changing the hearing location from Madison to Green Bay, Wisconsin. Although the ALJ's subsequent decision to alter the hearing format from in-person to video rendered any omission regarding the change in venue essentially moot, Claimant's counsel expressed concerns regarding the difficulties Claimant may encounter through use of that format (e.g., an unfamiliarity with Microsoft Teams, Claimant's limited access to Wi-Fi and/or the availability of a functional alternative location).

Thus, apart from misstating that the parties had not taken any action on the claim since November 2018, there is nothing in the record indicating Claimant engaged in the type of willful disobedience or dilatory action that would warrant the "drastic sanction" of dismissal. *See generally Kasalo*, 656 F.3d at 561; *Gabriel*, 514 F.3d at 736; *Twigg*, 23 BRBS at 122.

Second, as in *Twigg*, 23 BRBS at 122, there is nothing to show the ALJ considered all of the relevant factors in determining "the propriety of dismissal." While both parties sought continuances of the hearing before ALJ Bland and ALJ Leslie, the record contains evidence strongly indicating both parties believed: 1) the claim was not yet ready for a formal hearing; 2) additional issues may have arisen since the initial filing of the claim; and 3) the parties remained hopeful that informal discussions between themselves would lead to resolution or settlement of the claim without the need for OALJ intervention or adjudication.[13] Additionally, there is nothing to suggest Employer was prejudiced by any postponement or delay in the adjudication of Claimant's claim because Employer itself was in agreement with Claimant as to the processing of the case, it did not request dismissal of the case, and it did not object to Claimant's motion for the ALJ to reconsider dismissal as a sanction.[14]

Furthermore, prior to dismissing the claim, the ALJ did not consider the viability of lesser sanctions such as staying the proceedings until the parties complied with her directives or, as may be inferred from the parties' statements or actions, remanding the case to the district director for further development.[15] *Schilling v. Walworth Cnty. Park & Plan Comm'n*, 805 F.2d 272, 275 (7th Cir 1986) ("[T]he careful exercise of judicial discretion requires that a district court consider less severe sanctions and explain, where not obvious, their inadequacy for prompting the interests of justice."); *Twigg*, 23 BRBS at 122. Notably, the ALJ's sanction is one-sided; despite the fact Employer also failed to meet the ALJ's

[13] The fact that both Claimant and Employer responded to the ALJ's show cause order reflects their intent to seek an eventual resolution or settlement of this case.

[14] The record is devoid of any suggestion that Employer objected to the delays in the prosecution of this claim at the OALJ; rather, it indicates Employer participated in those delays, which the parties felt were necessary. CXs G, J.

[15] *See*, *e.g.*, 29 C.F.R. §18.57(b)(1)(iv) (an ALJ may stay further proceedings until her discovery order is obeyed); 29 C.F.R. §18.12(b)(7) (an ALJ has the authority to "remand when not inconsistent with statute, regulation, or executive order"); *see also* 29 C.F.R. §18.10(c) (an ALJ, with notice to parties, may waive, modify, or suspend any of the OALJ rules "when doing so will not prejudice a party and will serve the ends of justice").

March 3, 2022 scheduling order deadline, only Claimant was punished through the dismissal of his claim. *See generally Rice v. City of Chicago*, 333 F.3d 780, 786 (7th Cir. 2003) ("[W]here both of the litigants failed to respect and comply with court-imposed discovery time-lines, the court abused its discretion by imposing a sanction on only one of the malefactors, especially when the sanction employed is dismissal."). While the Board does not condone the missing of deadlines, under the circumstances of this case the sanction imposed by the ALJ is highly disproportionate to the conduct at issue.[16] *See generally Johnson v. Chi. Bd. of Educ.*, 718 F.3d 731, 732-33 (7th Cir. 2013).

For these reasons, the ALJ's orders dismissing Claimant's claim cannot stand. We hold dismissal of Claimant's claim and his corresponding rights under the Act is overly harsh and inappropriate. Thus, we vacate the ALJ's dismissal of the claim and remand the case for her to consider alternative, appropriate sanctions only after conducting a complete review of the parties' positions as set forth in their ongoing filings. *See generally Kasalo*, 656 F.3d at 561; *Gabriel*, 514 F.3d at 736; *Schilling*, 805 F.2d at 275; *Twigg*, 23 BRBS at

[16] We disagree with our dissenting colleague that Claimant's "perceived futility" in providing potential hearing dates by the ALJ's March 3, 2022 deadline may indicate "willful disobedience" of the ALJ's order. Counsel did not indicate she intentionally ignored the ALJ's order; rather, she noted her objection to the ALJ's instruction that she spend additional time negotiating with Employer on a joint hearing date. Further, the statement came only after a lengthy argument to the ALJ that dismissal for missing the deadline was "a harsh result" in light of (1) the fact that the parties had already provided hearing dates to the ALJ on January 28, 2022, and received a continuance of the February 21, 2022 hearing just days prior to the dismissal of the claim; and (2) complications and "recurrent illnesses" from the COVID-19 pandemic had continued to cause delays and disruptions in counsel's legal practice. She informed the ALJ she had been "working intermittently, with minimal staff and space, equipment and access issues, travel impediments, [and] health and safety concerns for remaining staff and family." In addition, she explicitly apologized "for not timely responding." Thus, contrary to our colleague's assessment, the "essence" of counsel's argument is not that she thought complying with the ALJ's deadline was pointless; instead, she set forth a cogent argument that dismissal of the claim was an overly harsh sanction in light of the circumstances of this case, including difficulties and delays counsel had experienced, of which the ALJ was already aware, due to the pandemic. But even if our dissenting colleague was correct that counsel's arguments somehow demonstrate "willful disobedience" of the ALJ's order, she still does not explain how the harsh and one-sided sanction of outright dismissal of the claim – two days after both parties missed one scheduling deadline – is appropriate under the circumstances. *Schilling v. Walworth Cnty. Park & Plan Comm'n*, 805 F.2d 272, 275 (7th Cir. 1986); *Rice*, 333 F.3d at 786.

122. We further instruct the ALJ that if she finds new issues have arisen with respect to the claim as Claimant alleges, she should consider whether to remand the case to the district director for further development of the record. *See* 20 C.F.R. §702.336.[17]

Accordingly, we vacate the ALJ's Order of Dismissal and Order Denying Reconsideration and remand the case for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONES, Administrative Appeals Judge, concurring in part and dissenting in part:

I concur with the majority's decision to vacate the ALJ's orders dismissing Claimant's claim and to remand the case for reconsideration; however, I write separately

[17] Section 702.336(a) provides:

> If, during the course of the formal hearing, the evidence presented warrants consideration of an issue or issues not previously considered, the hearing may be expanded to include the new issue. If in the opinion of the administrative law judge the new issue requires additional time for preparation, the parties shall be given a reasonable time within which to prepare for it. If the new issue arises from evidence that has not been considered by the district director, and such evidence is likely to resolve the case without the need for a formal hearing, the administrative law judge may remand the case to the district director for his or her evaluation and recommendation pursuant to §702.316.

20 C.F.R. §702.336(a). Generally speaking, remand to the district director in such instances may effectuate the regulatory scheme which is premised on the informal resolution of disagreements prior to resorting to a formal hearing. *See* 20 C.F.R. §702.301.

because I would not preclude the ALJ from again dismissing Claimant's claim if, after review of the totality of the circumstances of this case, she deems such action is warranted.

Although dismissal with prejudice is an extreme sanction, an ALJ has great discretion in regulating and sanctioning misconduct which occurs in proceedings before her. *See Corley v. Rosewood Care Ctr, Inc.* 142 F.3d 1041, 1052 (7th Cir. 1998); *Ball v. City of Chicago*, 2 F.3d 752, 760 (7th Cir. 1993). The ALJ's February 17, 2022 order expressly warned the parties that "[f]ailure to provide the proposed scheduling order by March 3, 2022 will result in the Claimant's case being DISMISSED." Despite being alerted to the consequences for failing to respond to the ALJ's order, Claimant made no effort whatsoever to contact the OALJ in response to her specific directive in her order. *See, e.g., Ball*, 2 F.3d 752 (Rule 41(b) dismissal proper as counsel failed to heed the district judge's repeated warnings that his behavior would result in dismissal). Moreover, his counsel's post-dismissal reasons for not responding to the ALJ's orders are insufficient.[18] For example, in seeking reconsideration of the ALJ's dismissal order, Claimant's counsel stated that "with due respect to the tribunal, spending time trying to agree on joint deadlines within the next six months that we will most likely be unable to meet for a case that is unlikely to be ready on that timeline anyway is not the best choice" in terms of use of her time. Similarly, in her appellate brief she stated she "did not send another pleading with a proposed scheduling order because a) I could not provide dates within the court's parameters and b) I had so little availability at that point it would be instead of essential care." Cl's Br. at 3. In essence, counsel maintains her unavailability for a hearing date before August 17, 2022, made it "pointless" to respond the ALJ's order. *Id.* Counsel's perceived futility as the reason for not responding to the ALJ's February 2022 order should not, as the ALJ stated in her order on reconsideration, obviate her duty as Claimant's representative and an officer of the tribunal to respond to OALJ within the specified time frame to explain the situation rather than provide such information only after Claimant's claim has been dismissed.[19] Counsel's course of conduct is potentially indicative of a willful disobedience of the ALJ's order and behavior which may rise to the level of contumacious conduct to justify the sanction of dismissal. *See Williams v. Chicago Bd. of Educ.*, 155 F.3d 853, 858 (7th Cir. 1998). However, the ALJ's failure to consider

[18] "The clients are principals, the attorney is an agent, and under the law of agency the principal is bound by his chosen agent's deeds." *United States v. 7108 West Grand Avenue,* 15 F.3d 632, 634 (7th Cir. 1994); *see also Link v. Wabash R.R.*, 370 U.S. 626, 633-634 (1962) (holding that, with respect to attorney misconduct that leads to Rule 41(b) dismissals, "each party is deemed bound by the acts of his lawyer-agent.").

[19] Employer's counsel, too, failed to respond to the ALJ's order and may not be immune from consequences on remand.

Claimant's counsel's behavior under the totality of the circumstances regarding the procedural delays in this case and her failure to consider the viability of lesser sanctions makes her decision to dismiss Claimant's claim premature. Nevertheless, on remand, the ALJ should have a full arsenal of sanctions at the ready in determining how this case proceeds, including an ability to dismiss Claimant's claim if she determines his counsel's conduct necessitates such action. *See generally Dickerson v. Board of Educ. of Ford Heights, Ill.,* 32 F.3d 1114, 1117 (7th Cir. 1994) (where a pattern of dilatory conduct is clear, dismissal need not be preceded by the imposition of less severe sanctions).

Thus, while I agree we must vacate the ALJ's dismissal of Claimant's claim and remand the case for further consideration, I would not foreclose the ALJ's authority to exercise her broad discretion and apply the sanction of dismissal of Claimant's claim if, after a complete consideration of the factors discussed herein, she determines such action is warranted.

MELISSA LIN JONES
Administrative Appeals Judge