U.S. Department of Labor

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

BRB No. 22-0186

MICHAEL MOSLEY Claimant-Respondent v. GENERAL DYNAMICS LAND SYSTEMS/FORCE PROTECTION, INCORPORATED and ALLIED WORLD ASSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED: 4/07/2023 DECISION and ORDER

Appeal of the Order Denying Employer's Motion to Vacate the Decision and Order for Default Judgment Against Employer and the Order Denying Employer's Motion for Reconsideration of Decision and Order for Default Judgment Against Employer of Dana Rosen, Administrative Law Judge, United States Department of Labor.

Joel S. Mills and Gary B. Pitts (Pitts, Mills & Ratcliff), Houston, Texas, for Claimant.

Diego J. Arredondo, Stephanie H. Wylie, and Ibrahim M. Amir (Sioli Alexander Pino), Miami, Florida, for Employer/Carrier.

William M. Bush (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, ROLFE and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Dana Rosen's Order Denying Employer's Motion to Vacate the Decision and Order for Default Judgment Against Employer, and the Order Denying Employer's Motion for Reconsideration of Decision and Order for Default Judgment Against Employer (2021-LDA-03344) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (Act), as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq*. (DBA). The ALJ's discretionary determinations will be upheld unless the challenging party establishes they are arbitrary, capricious, based on an abuse of discretion, or not in accordance with law. *See generally Armani v. Global Linguist Solutions*, 46 BRBS 63 (2012); *Tignor v. Newport News Shipbuilding & Dry Dock Co.*, 29 BRBS 135 (1995).

Claimant filed a claim on December 9, 2020, seeking benefits under the Act for alleged psychological injuries sustained during his work for Employer in Afghanistan and Iraq.[1] On or around December 15, 2020, the district director informed Employer, but not independently its carrier, by mail of Claimant's claim. The district director also mailed Employer a notice stating there was no record of it having filed a first report of injury (LS-202). He mailed Employer additional failure to file LS-202 notices on January 25, March 11, and again April 23, 2021. However, all of the district director's mailings to Employer, addressed to "Force Protection" at 78 Ladson Road, Summerville, South Carolina 29456 (Ladson Road address), were returned as undeliverable. Nevertheless, the district director continued to mail Employer claim documents to that same address.

[1] Because the ALJ's orders were filed by the district director in Jacksonville, Florida, the case arises under the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. 33 U.S.C. §921(c); *McDonald v. Aecom Technology Corp*., 45 BRBS 45 (2011); *see also Global Linguist Solutions, L.L.C. v. Abdelmeged*, 913 F.3d 921, 52 BRBS 53(CRT) (9th Cir. 2019).

In the interim, Claimant, on February 3, 2021, requested an informal conference by telephone, alleging he is entitled to ongoing temporary total disability starting January 26, 2020, for his work-related psychological condition. The district director sent Employer notice of the informal conference to the Ladson Road address, but that notice was again returned to the district director as undeliverable on March 6, 2021. Claimant, on March 11, 2021, filed an amended notice of claim, altering Employer's name to include "General Dynamics Land Systems" and adding "[w]e believe the appropriate carrier is AWAC."[2] The informal conference, scheduled for March 18, 2021, was cancelled, and at Claimant's request the claim was forwarded to the Office of Administrative Law Judges (OALJ), with the ALJ issuing a May 26, 2021 notice of hearing set for September 28, 2021. Employer was ostensibly served with this notice through electronic and regular mail, though no email address was listed, and the document was presumably mailed to the Ladson Road address. On July 15, 2021, counsel filed a motion to amend the case caption, which the ALJ granted on August 30, 2021.

On September 14, 2021, Employer filed its LS-202 with the Office of Workers' Compensation Programs (OWCP), in which it stated it only first learned of Claimant's claim on September 13, 2021. This prompted Claimant, on the same day, to file a motion for continuance with the OALJ. Claimant stated, as his rationale, that Employer only recently had begun participating in the case at the district director level even though the case was now before the OALJ. On September 15, 2021, the ALJ granted Claimant's motion to continue the hearing to attempt to resolve the matter without the need for a formal hearing. She additionally ordered Employer to enter an appearance by October 22, 2021, and show cause why it had not yet complied with the provisions of her September 14, 2021 Notice of Hearing, including participating in discovery.[3] She also ordered the parties to submit a status report by December 15, 2021.[4] On September 24, 2021, Employer's counsel submitted to OWCP a request for a copy of the case file, a request which apparently was left unanswered by OWCP. Three days later, Employer filed its Notice of Appearance before OWCP, serving the same on Claimant's counsel. At that time, Employer also requested Claimant provide it records relating to his claim.

[2] This district director mailed this document to the Ladson Road address on March 15, 2021; it was returned as undeliverable on July 3, 2021.

[3] The ALJ also detailed the consequences for failing to comply with the notice of hearing requirements.

[4] The administrative file before us does not specify the address where this order was sent.

On December 17, 2021, the ALJ, as a consequence of Employer's repeated violations of her instructions,[5] issued, pursuant to 29 C.F.R. §18.57,[6] her Decision and Order for Default Judgment Against Employer. Adopting Claimant's recitation of the facts, she awarded Claimant temporary total disability and medical benefits for his work-related psychological condition, payable by Employer, from June 1, 2013, based on his average weekly wage of $7,843. Employer, purportedly through its own diligence in seeking production of documents from Claimant, discovered for the first time on December 23, 2021, that the case was before the OALJ and that a default order finding it liable for Claimant's benefits had been issued. Employer immediately thereafter filed a motion to vacate the default judgment with the ALJ. In her order dated December 27, 2021, and upon review of the procedural history of the case, the ALJ found Employer established no good cause to set aside the default order. She therefore denied Employer's motion to vacate and informed the parties the default judgment "remains in effect." The ALJ denied Employer's motion for reconsideration by order dated January 19, 2022.

[5] Specifically, the ALJ stated that as of December 16, 2021, Employer had not complied with the notice of hearing by submitting its initial disclosures and participating in discovery or her show cause order by entering an appearance and providing updates regarding discovery and settlement discussions within the scheduled time frames.

[6] Section 18.57 of the OALJ Rules is entitled, "Failure to make disclosures or to cooperate in discovery; sanctions." Section (a) identifies motions for an order compelling disclosure or discovery put forth and acted upon by an ALJ, while Section (b) details actions an ALJ may take for a party's failure to comply with any discovery order. In particular, the provision the ALJ relied on in this case states, in pertinent part:

> **(b)** ***Failure to comply with a judge's order*** –
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> **(1)** ***For not obeying a discovery order.*** If a party or a party's officer, director, or managing agent - or a witness designated under §§ 18.64(b)(6) and 18.65(a)(4) - fails to obey an order to provide or permit discovery, including an order under § 18.50(b) or paragraph (a) of this section, the judge may issue further just orders. They may include the following:
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> **(vi)** Rendering a default decision and order against the disobedient party.

29 C.F.R. §18.57(b)(1)(vi).

On appeal, Employer maintains "good cause," as expressed in Rule 55(c) of the Federal Rules of Civil Procedure,[7] exists to vacate the default judgment because it was denied due process. It therefore requests the Board reverse the ALJ's orders to the contrary and remand this case for further proceedings.[8] Claimant responds, urging affirmance of the ALJ's default judgment and subsequent orders keeping it in effect, as she reasonably exercised her authority and Employer has not shown she applied an incorrect legal standard or abused her discretion. He maintains Employer has not satisfied its burden under the "excusable neglect" standard of Rule 60(b) of the Federal Rules of Civil Procedure.[9] The

[7] Rule 55 of the Federal Rules of Civil Procedure is entitled "Default; Default Judgment." The provision differentiates between "entering a default" (Rule 55(a)) and "entering a default judgment" (Rule 55(b)) and identifies the general circumstances under which either may be set aside (Rule 55(c)). Specifically, Rule 55(c) states:

> **(c) Setting Aside a Default or a Default Judgment.** The court may set aside an entry of default for good cause, and it may set aside a final default judgment under Rule 60(b).

Fed. R. Civ. P. 55(c) (Rule 55(c)).

[8] Employer did not appeal the Decision and Order for Default Judgment Against Employer, as the Notice of Appeal specifically appeals only the orders issued on December 27, 2021, and January 19, 2022.

[9] As written, Rule 55(c) distinguishes between setting aside an entry of default, which encompasses a "good cause" standard, and setting aside an entry of a final default judgment, which involves consideration of the factors articulated by Rule 60(b). Rule 60(b) states:

> **(b) Grounds for Relief from a Final Judgment, Order, or Proceeding.** On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
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> **(1)** mistake, inadvertence, surprise, or excusable neglect;
> **(2)** newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
> **(3)** fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
> **(4)** the judgment is void;

Director, Office of Workers' Compensation Programs (the Director), responds, stating the ALJ abused her discretion by refusing to grant Employer's motion to vacate as she failed to adequately explain why "good cause" did not exist to relieve Employer from the default judgment. He requests the Board vacate the default judgment and remand the case for further processing.

In her decision and subsequent orders, the ALJ reviewed the procedural history of Claimant's claim before the OALJ in conjunction with the OALJ Rules, 29 C.F.R. Subtitle A, Part 18. She noted Section 18.57(b) provides for "sanctions against a party that does not comply with the discovery orders" of an ALJ. Default Decision at 2. Among the available sanctions, the ALJ focused on Section 18.57(b)(1)(vi) which, as she accurately stated, permits an ALJ to render a default decision and order against the disobedient party. In particular, she stated, "[w]hen repeated violations occur, default judgment is necessary to render the process meaningful and it is the Judge's duty to conclude cases fairly and expeditiously." *Id.* at 3. She found Employer's general inactivity and repeated failure to comply with any of the multiple discovery directives she issued in this case constituted proper grounds for issuing a default judgment against Employer. In her subsequent orders, the ALJ after additional reviews of the procedural history of the case, found Employer did not show good cause for its non-feasance in this case. She therefore denied Employer's motion to vacate the default decision and subsequent motion for reconsideration.

As the Director notes, the Board has held an ALJ must explain why "good cause" does not exist to relieve a party from a default judgment. *McCracken v. Spearin, Preston & Burrows, Inc.,* 36 BRBS 136 (2002). In that case addressing an ALJ's issuance of a default decision against the employer in accordance with the applicable OALJ Rules[10] for

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> **(5)** the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
> **(6)** any other reason that justifies relief.

Fed. R. Civ. P. 60(b) (Rule 60(b)).

[10] The Board held the OALJ rules were applicable because "no provision of the Act or its regulations" addressed default judgments. *McCracken*, 36 BRBS at 139. In *McCracken*, the ALJ issued his default judgment pursuant to Section 18.39(b), 29 C.F.R. §§18.39(b) (2014) (now 29 C.F.R. §18.21(c)), which regulated the authority for such action under Section 18.5(b), 29 C.F.R. §18.5(b) (2014) (now 29 C.F.R. §18.57(b)(1)(vi)), by requiring a determination as to whether a party shows "good cause" for failing to appear at a hearing. *McCracken*, 36 BRBS at 140. Section 18.21(c) is inapplicable to this case because no hearing or conference was held; it nevertheless provides guidance into what is

its failure to appear at the hearing,[11] the Board held he should have looked to Rule 55(c) of the Federal Rules of Civil Procedure with respect to setting aside a default judgment.[12] *McCracken*, 36 BRBS at 139-141. Recognizing default is a "harsh sanction,"[13] the Board, citing pertinent federal appellate law interpreting Rule 55(c),[14] identified several factors for the ALJ to address in determining whether a party should be relieved from a default

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necessary for "the disobedient party" to have what is, in essence, a default decision and order vacated.

[11] In *McCracken*, after the ALJ set the hearing date, a state court order declared the employer's carrier insolvent, placed it in liquidation, and ordered a 90-day stay in all state proceedings involving the carrier's obligations to defend any party. *McCracken*, 36 BRBS at 137. This prompted the carrier's attorney, who at the time also represented the employer, to request from the ALJ a 90-day stay on the Longshore claim. *Id.* Ten days prior to the scheduled hearing, the ALJ issued an order requiring all parties to appear at the hearing to argue the employer/carrier's motion and, if necessary, the merits of the claim. *Id.* However, four days prior to the hearing, the employer was notified by carrier's attorney that he would not represent it at the hearing, leading the employer to request a 30-day continuance in order to obtain a new attorney; a request the ALJ did not receive until the morning of the hearing. *Id.* At the hearing, Claimant, his attorney, and counsel for the Director appeared, but the employer did not. *Id.* Because of this, the ALJ stated the employer's motion to stay the case had been withdrawn, he denied its motion for a continuance, and declared the employer in default. *Id.* at 138. The ALJ thereafter issued a default judgment against the employer ordering it to pay the claimant permanent total disability benefits, medical benefits, and an attorney's fee. *Id.*

[12] The Board stated this is because Rule 55(c), which pertains to setting aside a default judgment, employs the same "good cause" language as the OALJ rule applicable to the specific facts in that case, former rule 29 C.F.R. §18.39(b).

[13] Various Court of Appeals prefer decisions on the merits and agree default judgments are disfavored. *See, e.g., Lindsey v. Prive Corp.,* 161 F.3d 886, 893 (5th Cir. 1998); *Security Ins. Co. of Hartford v. Schipporeit, Inc.,* 69 F.3d 1377, 1381 (7th Cir. 1995); *Florida Physician's Ins. Co. v. Ehlers,* 8 F.3d 780, 783 (11th Cir. 1993); *Taylor v. City of Ballwin,* 859 F.2d 1330, 1332 (8th Cir. 1988); *Zawadski de Bueno v. Bueno Castro,* 822 F.2d 416, 420 (3d Cir. 1987); *Lolatchy v. Arthur Murray, Inc.,* 816 F.2d 951, 954 (4th Cir. 1987).

[14] In particular, the Board stated the United States Court of Appeals for the Second Circuit's decision in *Enron Oil Corp. v. Diakuhara,* 10 F.3d 90 (2d Cir. 1993), "is instructive on the issue of 'good cause.'"

judgment for good cause. *Id*. These include: 1) whether the default was willful; 2) whether setting aside the default would prejudice the adversary; 3) whether a meritorious defense is presented; 4) whether the failure to follow a rule or procedure was done in good faith; and 5) whether the entry of default would bring about a harsh result. *See McCracken*, 36 BRBS at 140 (citing *Enron Oil Corp. v. Diakuhara*, 10 F.3d 90 (2d Cir. 1993)); *see also Perez v. Wells Fargo N.A.*, 774 F.3d 1329, 1338 n.7 (11th Cir. 2014) (noting Rule 55(c) good cause is a "mutable standard" generally considering whether the default was willful, whether setting it aside would prejudice the non-moving party, and whether the defaulting party may have a meritorious defense); *Compania Interamericana Exp.-Imp., S.A. v. Compania Dominicana de Aviacion*, 88 F.3d 948, 951 (11th Cir. 1996) (same). The Board further recognized, as the *Diakuhara* court observed, although default procedures are useful for an "obstructionist adversary," defaults are generally disfavored and should be used only on rare occasions. *McCracken*, 36 BRBS at 140. Moreover, the Board acknowledged, "where doubt exists as to whether the default should be granted or vacated, the outcome should favor the defaulting party." *Id.*

In this case, although the ALJ found Employer did not establish good cause to set aside the default judgment, she neither fully discussed the reasons Employer provided for its failure to appear nor addressed whether those reasons constituted good cause in terms of the appropriate factors. In her orders, she instead repeatedly focused on Employer's failure to act, without addressing whether there was indeed good cause underlying its lack of action before the OALJ. In this regard, she stated Employer, despite having received four notices from OALJ regarding this case,[15] "did nothing for 8 months" and then only responded after she issued her default judgment. Order Denying M/Vacate at 3; Order Denying Recon. at 4. She further rejected Employer's assertion that it was denied due process because her review of the evidence established it was listed on the service sheet and therefore "given multiple opportunities to respond to the court's orders, to defend the case, and [it] failed to do so." *Id.* The ALJ speculated instead, "Employer failed to timely hire counsel to defend the case, which is [its] choice." *Id.* Moreover, she found Employer provided no excuse for "not complying with any of the court's very specific responsive time deadlines." Order Denying M/Vacate at 3. As such, the ALJ's actions are premised on her supposition that Employer had actual or constructive notice of the processing of this case before the OALJ prior to her issuance of the default judgment; a belief which is unsupported by the record before us.

[15] This included correspondence regarding: the March 22, 2021 notice transferring the claim from OWCP to OALJ; the May 26, 2021 notice amending the case caption; the August 30, 2021, notice amending the case caption; and the September 15, 2021, order granting a continuance and directing Employer to participate in the case.

As the Director states, the record supports Employer's position that it did not receive actual notice of the claim until September 2021 and did not know the case was before the OALJ, and not OWCP, until after the ALJ entered her default judgment in December 2021. As evidenced by the "undeliverable" receipts the Director provided, it appears Employer was never served with any of the notices OWCP or OALJ mailed.

Once Employer notified Carrier, they took direct steps, in September 2021, to actively participate in the adjudication of this claim. Employer, through counsel, immediately requested a copy of the case file from OWCP but maintains it never received any documents or responses to its request, including information from OWCP advising that the case had already been forwarded to the OALJ. Employer also filed a notice of appearance with OWCP, which it served on Claimant's counsel, along with a request for Claimant to provide Employer with "any previously submitted discovery." Despite this contact, Claimant's counsel neither advised Employer that the case had already been transferred to the OALJ nor provided Employer the requested documents in a timely fashion.[16] Moreover, the ALJ did not consider whether Employer presented a meritorious defense to the claim,[17] and the ALJ's summary award of $678,492.16 in benefits, payable by Employer,[18] is a harsh result, particularly given Employer's lack of opportunity to dispute any aspects of Claimant's claim.

For these reasons, in accordance with *McCracken*, we vacate the ALJ's Orders declining to lift or vacate the default judgment and remand the case for further proceedings. On remand, the ALJ must first assess whether Employer has presented good cause to lift the default judgment, the provisions articulated in Rule 55(c), and the corresponding factors discussed in *McCracken*. If she lifts the default and vacates her decision, she may then proceed with the adjudication of the claim, including providing the parties with the

[16] Apparently, Claimant's counsel only complied on December 23, 2021, approximately three months after Employer's document request and subsequent to the ALJ's default judgment. Employer, as previously noted, maintains its receipt of these documents represented the first time it had knowledge the case was before the OALJ and not the OWCP.

[17] Employer states it contests the existence of an employment relationship with Claimant at the time of alleged injury.

[18] Employer states this represents payment from June 1, 2013, up to the date of filing of its petition for review, a period of 512 weeks. It multiplied those 512 weeks by an average weekly wage of $1,325.18, which it states represents the applicable statutory maximum compensation rate as of 2013. 33 U.S.C. §906(b)(1).

opportunity to engage in discovery, present evidence,[19] and make arguments regarding the merits of Claimant's claim for benefits.[20]

Accordingly, we vacate the ALJ's Order Denying Employer's Motion to Vacate the Decision and Order for Default Judgment Against Employer, and the Order Denying Employer's Motion for Reconsideration of Decision and Order for Default Judgment

[19] The ALJ may hold an evidentiary hearing on the issues raised by the parties. 33 U.S.C. §§919(d), 923; 20 C.F.R. §702.331 *et seq.*

[20] As the ALJ must reconsider the default order, including the award of benefits, on remand, we decline to address the ALJ's award of benefits at this time.

Against Employer and remand this case for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge