U.S. Department of Labor

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

BRB No. 24-0045

BONNIE BURTON (Widow of BENNIE BURTON) Claimant-Respondent v. OLD JB LLC f/k/a JEFFBOAT LLC f/k/a JEFFBOAT, INCORPORATED Self-Insured Employer-Petitioner	)	**NOT-PUBLISHED** DATE ISSUED: 08/14/2025 DECISION and ORDER

Appeal of Order Granting Claimant's Motion for Summary Decision and Order Denying Employer's Motion for Reconsideration of Jerry R. DeMaio, Administrative Law Judge, United States Department of Labor.

Dana L. Simoni (Embry, Neusner, Arscott & Shafner, LLC), Groton, Connecticut, for Claimant.

Joseph A. Regan and Francis G. McSweeney (Regan & Kiely LLP), Quincy, Massachusetts, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Jerry R. DeMaio's Order Granting Claimant's Motion for Summary Decision and Order Denying Employer's Motion for Reconsideration (2023-LHC-00423) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (Act). We must affirm the ALJ's findings of fact and conclusions of law if they are rational,

supported by substantial evidence, and in accordance with applicable law.[1] 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Decedent Bennie Burton worked for Employer for thirty-one years, from 1964 until 1995, as a pipefitter and supervisor, during which time he was allegedly exposed to asbestos, welding fumes, and other toxic substances. Following his death in November 2017, his widow, Claimant Bonnie Burton, filed a claim for death benefits under the Act, 33 U.S.C. §909. An informal conference was held in December 2022, after which the claim was referred to the Office of Administrative Law Judges (OALJ) for a formal hearing. On February 22, 2023, the ALJ issued a Notice of Assignment, Hearing and Pre-Hearing Order (Initial Order) setting the hearing date for August 29, 2023, and providing discovery and filing deadlines.

After receiving the Initial Order, Employer did not participate in discovery at all; it failed to file initial disclosures, respond to interrogatories, or identify any facts or expert opinion indicating Decedent's occupational exposures did not contribute to his death. Employer similarly failed to provide any information for the proposed Joint Prehearing Statement or file any exhibits despite receiving numerous phone calls, emails, and letters from Claimant's attorney.

On July 24, 2023, Claimant filed a Motion for Summary Decision (MSD) and supporting memorandum arguing that because of Employer's failure to participate in discovery, it was indisputable, on the corresponding record, that Decedent's occupational exposures contributed to his death. In support of her motion, Claimant presented Decedent's deposition testimony (obtained in 2014 as part of a co-worker's claim for benefits), a report from his primary care physician,[2] and reports from two medical experts.[3] MSD at 2-5, 8, 10-11. Claimant argued this evidence sufficiently invoked the Section 20(a)

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit because Decedent sustained his alleged injury in Jeffersonville, Indiana. 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 (4th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003); 20 C.F.R. §702.201(a).

[2] Decedent's primary care physician, Dr. Bennett Williams, issued a letter on March 17, 2022, stating he was "confident" Decedent's shortness of breath contributed to and hastened his death. Claimant's Exhibit (CX) 9.

[3] Both Dr. Susan Daum, who practices environmental and occupational medicine, and Dr. Jerrold Abraham, an environmental and occupational pathologist, reviewed Decedent's medical records and concluded Decedent's reported asbestos exposure contributed to his death. CX 3 at 19-20; CX 6 at 1.

presumption of compensability, 33 U.S.C. §920(a), and that Employer had not put forth any evidence to rebut it. Consequently, Claimant maintained there was no genuine issue of material fact in dispute that could rebut her prima facie case that Decedent's occupational exposures contributed to his death. *Id*. She therefore requested the ALJ grant her MSD and issue an order awarding funeral expenses as well as death benefits. *Id*. at 13. Employer did not respond to Claimant's MSD.

On August 21, 2023, after Employer's response to the MSD was due, the ALJ issued an Order to Show Cause (OSC) as to why the MSD should not be granted given Employer's failure to respond, to file any trial exhibits, or to contribute to a Joint Prehearing Statement in accordance with the Initial Order. He gave Employer until August 28, 2023, to "enter an appearance and address these failures." OSC at 2.

Employer responded on August 28, 2023 -- the evening before the scheduled start of the formal hearing -- through counsel James D. Bercaw, with an Opposed Motion to Continue Hearing and Disposition of Motion for Summary Decision (M/Continue). Mr. Bercaw also filed a Notice of Appearance. But Mr. Bercaw did not contend Employer was unaware of this action, that any of the pleadings or discovery requests were improperly served or not actually received, or that he had even attempted to contact either Claimant's counsel or the ALJ at any time in the months after receiving the Initial Order. Instead, Mr. Bercaw simply claimed his schedule justified both his failure to participate in discovery and to not notify Claimant or the ALJ of that fact until the evening prior to the formal hearing.

Mr. Bercaw explained he represented Employer (as the plaintiff) in two pending federal court cases, one of which had a previously scheduled conference on August 29, 2023, and the other involving complex litigation with multiple deadlines, hearings, and corporate depositions scheduled throughout the end of July and through mid-August 2023. M/Continue at 1-4. He indicated he contacted Claimant's counsel on August 17, 2023, informing her he would be filing a motion to continue "because of his overwhelming case load," and noting that she opposed any such motion. *Id*. at 4. He apologized for his "inability to comply with the deadlines set forth by this Court," explaining his "attention has been consumed by the [federal court] litigation round the clock starting the week before Claimant filed her motion for summary judgment."[4] Without indicating any facts in dispute or addressing how Employer would develop a defense if given the opportunity, Mr. Bercaw requested the ALJ simply "reset" both the hearing on Claimant's MSD and the formal hearing. *Id*.

On September 1, 2023, the ALJ issued an Order Granting Claimant's Motion for Summary Decision (MSD Order). He found Employer's counsel's involvement in other

[4] Notably, Claimant had filed the MSD on July 24, 2023.

litigation did not constitute good cause for failing to respond to the MSD when Employer completely failed to participate in discovery over the prior six months. Further, the ALJ found Employer had "ample time and opportunity" to participate or request a continuance since the issuance of the Initial Order in February 2023. MSD Order at 2. The ALJ thus determined he could "not find that good cause has been shown" to "deem the Motion for Summary Decision" opposed. *Id*. at 3. And he concluded: "Claimant has shown sufficient evidence to state a prima facie case, which is all that is necessary to grant" the motion. *Id*. As a result, the ALJ awarded Claimant funeral expenses and death benefits at a rate of $367.95[5] per week beginning November 18, 2017, to the present and continuing, along with interest on all past-due benefits. *Id*. at 3-4.

On September 15, 2023, Employer, with new representation, moved for reconsideration (M/Recon). Employer's new counsel, Joseph Regan, did not argue that good cause justified a continuance but instead maintained a distinction should be drawn between the conduct of Employer and its prior counsel. While not contending any improper service took place, he alleged Employer was unaware of Mr. Bercaw's disregard of all filing deadlines and proceedings. M/Recon at 3. According to an affidavit from Employer's Senior Risk Analyst, Charlene Payne, Employer had received no communication from Mr. Bercaw since November 2022 (when he notified her the informal conference had been rescheduled), despite attempting to contact him following receipt of the Memorandum of Informal Conference in January 2023. She indicated Employer never received or was notified of the Initial Order, Claimant's discovery requests, or Claimant's settlement demand, and only became aware of Claimant's MSD and the ALJ's OSC after Claimant's counsel provided Employer with a copy of the MSD Order on September 11, 2023.[6] While acknowledging the "degree of neglect…demonstrated in these proceedings [wa]s inexcusable," Employer did not attempt to argue that information that was not available at the time of the ALJ's MSD Order or a mistake of law justified reconsideration and provided good cause for a continuance. Instead, it argued that dispositive relief was too harsh a "sanction" for its prior attorney's inexcusable misconduct.[7]

---

[5] This rate represents the statutory minimum rate of 50% of the National Average Weekly Wage at the time of Decedent's death on November 17, 2017, which was $735.89 per week. MSD at 13; *see* 33 U.S.C. §§909(b), (e), 906(b).

[6] Ms. Payne, however, did not explain why she failed to further follow up with Mr. Bercaw in the months after her initial request for a call back and before receiving the MSD Order.

[7] Employer also contended the MSD was untimely. The ALJ's Initial Order required motions for summary decision be filed at least sixty days prior to the hearing, or by June 30, 2023. Initial Order at 6. The OALJ Rules of Practice and Procedure, however, set a deadline of thirty days prior to the hearing for parties to file motions for summary decision,

The ALJ summarily denied Employer's M/Recon on September 27, 2023, finding he committed no mistake of fact or law in his previous decision. Recon. Order at 2. He acknowledged Employer's current counsel was not "culpable for this trajectory of this matter" but found that to grant reconsideration would give Employer an "immediate second bite at the apple" simply because it had hired new counsel. *Id*. at 2 n.1.

Employer appeals, arguing the ALJ's denial of its M/Continue, which it characterizes as a "de facto default judgment," was an unduly "harsh sanction" for its attorney's misconduct, constituting an abuse of discretion. Alternatively, Employer contends the ALJ failed to consider the MSD in a light most favorable to it as the non-movant.[8] Claimant responds, urging affirmance.

Initially, we reject Employer's attempt to reframe the issue on appeal as a sanction for discovery abuses rather than as a denial of a request for a continuance. A request for a continuance and a request to set aside a dismissal or default sanction are two distinct requests covering two separate sets of circumstances, governed by different regulations. Rule §18.41(b)(1) of the OALJ Rules of Practice and Procedure, which covers the request for a continuance at issue in this case, mandates the moving party do so "promptly after the party becomes aware of the circumstances supporting the continuance." 29 C.F.R. §18.41(b)(1). And the Act's regulations elsewhere further discourage continuances, indicating they will not be granted except for "extreme hardship" or because a party is unavailable due to a previously scheduled proceeding. 20 C.F.R. §702.337(b). An ALJ's decision to continue a hearing will only be overturned upon a showing of a clear abuse of discretion. *Colbert v. National Steel & Shipbuilding Co.*, 14 BRBS 465, 467 (1981).

The ALJ did not abuse his discretion in finding Employer failed to establish good cause for continuing the hearing or allowing more time for it to respond to Claimant's MSD. The M/Continue did not provide any plausible reason justifying Employer's former counsel's failure to participate in discovery, nor explain why he waited so long to request

---

"[u]nless the judge orders otherwise." 29 C.F.R. §18.72(b). Claimant filed the MSD on July 24, 2023, thirty-six days prior to the formal hearing. While this is outside of the ALJ's Initial Order deadline of sixty days, it is within the thirty-day deadline generally provided under 29 C.F.R. §18.72(b). Regardless, given Employer's failure to develop a defense of this claim, it is difficult to see how denying the MSD as untimely and going forward with the formal hearing at that time could have led to a different result.

[8] Employer also submits a Motion for Oral Argument, maintaining oral argument before the Board is "necessary…because it will assist the Board in understanding the issues presented in the Petition for Review." 20 C.F.R. §802.305. Claimant has filed an opposition to the request. Based on the issues raised, the Board finds oral argument is not necessary in this case and denies Employer's motion. 20 C.F.R. §802.306.

a continuance. As the ALJ noted, Mr. Bercaw and his firm had been "served with all relevant documents beginning over six months prior, from the District Director, from Claimant, and from this Tribunal," but had failed to request a continuance or participate in discovery. MSD Order at 2. Rejecting Mr. Bercaw's bare excuse that he was too busy to respond or explain why under the circumstances was not a sanction for misconduct. Rather, finding that excuse failed to amount to good cause to restart the entire litigation was a reasonable exercise of his broad discretionary powers in conducting hearings. 33 U.S.C. §§ 923(a), 927(a); *U.S. v. Depoister*, 116 F.3d 292, 294 (7th Cir. 1997); *Smith v. Ingalls Shipbuilding Div., Litton Systems Inc.*, 22 BRBS 46, 50 (1989) ("[A] party seeking to admit evidence must exercise diligence in developing its claim prior to the hearing."); *Colbert*, 14 BRBS at 467; 20 C.F.R. §§702.338, 702.339. As the ALJ did not abuse his discretion in finding Employer failed to establish good cause justifying a continuance or adequately explain its lack of response to the MSD, we affirm his denial of Employer's M/Continue.[9]

Alternatively, Employer contends the ALJ, in granting summary decision, failed to view the evidence in a light most favorable to it as the non-movant. Employer's Petition for Review and Brief (ER Br.) at 8, 12-13. Specifically, Employer argues Claimant's expert medical opinions are, at times, equivocal and conflict with the opinions of Decedent's treating physicians. *Id*. at 13. As a result, Employer maintains a genuine issue

[9] Rule 18.57(b)(1)(vi) of the OALJ Rules, conversely, permits an ALJ to issue sanctions against parties for failing to comply with a judge's discovery order, including to "[r]ender[] a default decision and order against the disobedient party." 29 C.F.R. §18.57(b)(1)(vi). Default judgments or dismissal as a sanction are considered a harsh sanction and the Seventh Circuit, which has appellate jurisdiction over this claim, has generally reserved default or dismissal under the corresponding Federal Rule for cases where the offending party's motive involved "willfulness, bad faith, or fault." *See, e.g.*, *Long v. Steepro*, 213 F.3d 983, 986 (7th Cir. 2000). Denying a motion for a continuance, on the other hand, does not depend on a showing of improper motive -- only a finding that just cause does not exist to grant the request. Thus, Employer's primary argument on appeal is misplaced. But even if Rule 18.57(b)(1)(vi) governed this dispute, we still would be hard pressed not to find Employer's counsel's conduct to be willful or in bad faith because -- by counsel's own admission -- it was done with a conscious disregard of the OALJ Rules and the ALJ's orders. And it is long settled that a client is bound by its attorney's misconduct. *Link v. Wabash R. Co.*, 370 U.S. 626 (1962) (affirming dismissal of case where an attorney failed to appear at a pretrial conference because of an "inadequate" excuse, holding "any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent, and is considered to have notice of all facts, notice of which can be charged upon the attorney.") (citation omitted).

of fact exists as to the cause of Decedent's death and therefore asserts summary decision is inappropriate. *Id*. (citing *Driveline Sys., LLC v. Arctic Cat, Inc.*, 936 F.3d 576, 579 (7th Cir. 2019)).

In determining whether to grant a party's motion for summary decision, the ALJ must determine, after viewing the evidence in the light most favorable to the non-moving party, whether any genuine issues of material fact exist and whether the moving party is entitled to summary decision as matter of law. 29 C.F.R. §18.72; *O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55, 61 (2d Cir. 2002); *R.V.* [*Villaverde*] *v. J. D'Annunzio & Sons*, 42 BRBS 63, 64 (2008), *aff'd sub nom. Villaverde v. Director, OWCP*, 335 F. App'x 79 (2d Cir. 2009). To defeat a motion for summary decision, the party opposing the motion must establish the existence of an issue of fact which is both material and genuine; material in the sense of affecting the outcome of the litigation and genuine in the sense of there being sufficient evidence to support the alleged factual dispute. *O'Hara*, 294 F.3d at 61; *Buck v. General Dynamics Corp.*, 37 BRBS 53, 54 (2003). Merely disputing the moving party's allegations is insufficient to raise a material and genuine issue of fact. *Buck*, 37 BRBS at 55; *see* 29 C.F.R. §18.72.

In this case, the ALJ found Claimant submitted uncontroverted evidence sufficient to invoke the Section 20(a) presumption and, by failing to oppose the motion, Employer failed to demonstrate the existence of a genuine issue of material fact that would require a hearing. MSD Order at 3. Employer maintains its lack of opposition, on its own, is insufficient to support summary judgment. ER Br. at 12 (citing *Hibernia Nat'l Bank v. Administracion Central Sociedad Anonima*, 776 F.2d 1277, 1279 (5th Cir. 1985)). We disagree.

Once a claimant invokes the Section 20(a) presumption, as in this case, the burden shifts to the employer to rebut the presumption by producing substantial evidence of the lack of a causal nexus. *American Grain Trimmers, Inc. v. Director, OWCP*, 181 F.3d 810, 815 (7th Cir. 1999). To be substantial, the evidence must consist of facts, not speculation, and must be "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Rainey v. Director, OWCP*, 517 F.3d 632, 637 (2d Cir. 2008) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)); *see also Am. Grain Trimmers, Inc.*, 181 F.3d at 817 ("The critical point is thus whether the evidence that the trier of fact chooses to believe is substantial enough in quantity to support the finding that was made.").

Employer provided no evidence or argument below on rebuttal, and on appeal it argues for the first time that Claimant's experts' opinions contradicted those of Decedent's treating physicians and should be ignored. ER Br. at 13. Employer forfeited that argument, however, by not presenting it below. *Johnston v. Hayward Baker*, 48 BRBS 59, 63 (2014); *Boyd v. Ceres Terminals*, 30 BRBS 218, 223 (1997). Regardless, the weighing of a physician's credibility is not appropriate at either the invocation stage or the rebuttal stage

of the Section 20(a) analysis, *Rose v. Vectrus Systems Corp.*, 56 BRBS 27 (2022) (en banc), *appeal dismissed* (M.D. Fla. Aug. 24, 2023); *Cline v. Huntington Ingalls, Inc. (Avondale Operations)*, 48 BRBS 5, 7 (2013), and in the absence of any rebuttal evidence from Employer, the ALJ rationally and reasonably concluded no dispute existed as to the compensability of Claimant's claim under Section 20(a). *Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011); *Buck*, 37 BRBS at 55.

Accordingly, we affirm the ALJ's Order Granting Claimant's Motion for Summary Decision and his Order Denying Employer's Motion for Reconsideration.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge