

U.S. Department of Labor

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



BRB No. 24-0403

KAMESHA NELSON

Claimant-Petitioner

v.

MTC EAST d/b/a PORTS AMERICA
INCORPORATED

and

PORTS INSURANCE COMPANY

Employer/Carrier-
Respondents

NOT-PUBLISHED

DATE ISSUED: 07/22/2026

DECISION and ORDER

Appeal of the Order of Dismissal and Order Canceling Hearing of Monica Markley, Administrative Law Judge, United States Department of Labor.

Kamesha Nelson, Johns Island, South Carolina.

Brian P. McElreath and J. Jacob Nixon (Lueder, Larkin & Hunter, LLC), Mount Pleasant, South Carolina, for Employer and its Carrier.

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

PER CURIAM:

Claimant, without representation, appeals Administrative Law Judge (ALJ) Monica Markley's Order of Dismissal and Order Canceling Hearing (Order of Dismissal) (2024-LHC-00192) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (Act). We will review the ALJ's

dismissal of Claimant's claim under the abuse of discretion standard.¹ See, e.g., *Goforth v. Owens*, 766 F.2d 1533, 1535 (11th Cir. 1985); *Taylor v. B. Frank Joy Co.*, 22 BRBS 408, 411-412 (1989).

Claimant sustained a back injury while working for Employer. Emp. Mot. to Dismiss, Exhibits 1, 18; Cl. Response to Mot. to Dismiss at 22. On August 14, 2020, Claimant filed a Pre-Hearing Statement (Form LS-18) seeking temporary total disability benefits from May 6 through July 12, 2020, and the case was assigned to District Chief ALJ Paul C. Johnson, Jr. (2020-LHC-00978). Emp. Mot. to Dismiss, Exhibits 1, 3. Subsequently, Claimant emailed ALJ Johnson and expressed "confus[ion]" about why a hearing was necessary because she had received backpay from Employer and had returned to work. Cl. Response to Mot. to Dismiss, Exhibit 7. Consequently, ALJ Johnson determined "there is nothing left to decide" and remanded the matter to the district director. See *Nelson v. M.T.C. E. d/b/a Ports Am., Inc.*, 2020-LHC-00978 (ALJ July 8, 2022).

On November 9, 2023, Claimant filed a new Pre-Hearing Statement (Form LS-18), and the case was assigned to the ALJ (2024-LHC-00192). Emp. Mot. to Dismiss, Exhibits 18, 19. Because Claimant challenges the ALJ's dismissal, we will describe the procedural history.

On February 15, 2024, the ALJ issued a Notice of Assignment and Notice of Hearing and Scheduling Order (Notice of Hearing), which directed the parties to provide initial disclosures to the opposing party within twenty-one days and to complete discovery no later than forty days before the hearing date of August 14, 2024. Notice of Hearing at 2. On February 5, 2024, Employer served Claimant with Interrogatories, Requests for Production, and Requests for Admission. Emp. Motion to Compel Claimant's Initial Disclosures & Claimant's Responses to Employer/Carrier's First Set of Discovery (Mot. to Compel Discovery), Exhibit B. Claimant did not serve her initial disclosures or respond to Employer's discovery requests. Order of Dismissal at 3-4, 6-7.

On January 17, 2024, Employer scheduled an examination of Claimant with Dr. Michael Wildstein for February 16, 2024, and on February 9, 2024, Claimant's counsel asked to reschedule the examination and stated he would file a motion for a protective order. Emp. Motion to Compel Claimant's Attendance at IME Appointment (Mot. to

¹ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant sustained the injury at issue in this case in South Carolina. 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).

Compel Attendance), Exhibits A, B. On February 13, 2024, Employer rescheduled the examination for March 11, 2024, and on March 7, 2024, Claimant's counsel indicated Claimant would not attend the examination. *Id.*, Exhibits C, D. On March 8, 2024, Employer filed a motion to compel attendance at the examination with Dr. Wildstein, and Claimant moved for a protective order to prohibit the examination because "Dr. Wildstein ha[d] examined [Claimant] in the past" and Claimant has "personal issues with Dr. Wildstein," and because previous follow-up examinations had not occurred. Emp. Mot. to Compel Attendance; Cl. Mot. for Protective Order. On March 8, 2024, the ALJ denied Claimant's motion because her objection to the examination was untimely, granted Employer's motion because it had provided Claimant with timely notice of the examination, and ordered Claimant to attend the examination on March 11, 2024. Order to Compel Attendance at 2. The ALJ advised Claimant "that the failure to abide by this Order can subject her to sanctions under 29 C.F.R. §18.57." *Id.* Claimant did not attend the March 11 examination or the rescheduled examination set for April 17, 2024. Order of Dismissal at 3-4, 6-7; Emp. Mot. to Dismiss, Exhibit 20.

On May 6, 2024, Employer moved to compel Claimant's initial disclosures and responses to its discovery requests. Emp. Mot. to Compel Discovery at 1-2. Employer stated Claimant had not served her Initial Disclosures, which were due on March 7, 2024, nor her discovery responses, which were due on May 6, 2024. *Id.* at 2, Exhibits B, C; Notice of Hearing at 2. Claimant did not respond to Employer's motion, and on May 22, 2024, the ALJ granted Employer's motion, ordering Claimant to serve initial disclosures and discovery responses by June 5, 2024. Order to Compel Discovery at 2. The ALJ warned Claimant "that the failure to obey this discovery order will result in sanctions under Section 18.57." *Id.* Claimant did not comply with this order. Order of Dismissal at 3-4, 6-7.

On June 6, 2024, Employer moved to dismiss the claim under Rule 41(b) of the Federal Rules of Civil Procedure, which provides for dismissal upon a motion for failure to prosecute or comply with court orders, based on Claimant's "systematic refusals to respond" to its discovery requests, participate in litigation, or comply with the ALJ's orders.² Emp. Mot. to Dismiss at 5-9. On June 28, 2024, Claimant responded, arguing, in part, that she had requested to be seen by Dr. Wildstein in 2021 and Employer denied her request, and that she had responded to Employer's interrogatories and discovery requests in February 2022. Cl. Response to Mot. to Dismiss at 2-4, 22-25, Exhibits 1, 3, 6.

² Rule 41(b) states in relevant part: "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 . . . [the order] operates as an adjudication on the merits." Fed. R. Civ. P. 41(b).

Employer moved to amend its motion to dismiss because Claimant had not complied with either of the ALJ's 2024 orders and because Claimant had not previously disclosed a car crash in 2020 that resulted in an injury. Emp. Motion to Amend. The ALJ granted Employer's motion to amend.

On July 5, 2024, the ALJ cancelled the hearing and dismissed Claimant's claim with prejudice. Order of Dismissal at 10. She found Claimant "completely failed" to engage in discovery and did not comply with the ALJ's orders compelling her initial disclosures and discovery responses and to attend Employer's scheduled examination.³ *Id.* at 6-10. Because Claimant failed to cooperate in discovery and comply with her orders, the ALJ determined sanctions under Section 18.57(b) of the Office of Administrative Law Judges' Rules of Practice and Procedure, 29 C.F.R. §18.57(b)(1), were warranted.⁴ *Id.* at 8. In considering whether dismissal was the appropriate sanction under Section 18.57, the ALJ considered the factors set forth in *Twigg v. Maryland Shipbuilding & Dry Dock Co.*, 23 BRBS 118, 121-122 (1989) (citing *Davis v. Williams*, 588 F.2d 69, 70 (4th Cir. 1978)): 1) degree of personal responsibility on the part of the claimant; 2) amount of prejudice to the employer caused by the delay; 3) presence or absence of a drawn-out history of deliberately proceeding in a dilatory fashion; and 4) effectiveness of sanctions less drastic than

³ The ALJ acknowledged Claimant's assertion that she had responded to discovery in February 2022 and had requested to be seen by Dr. Wildstein in June and July 2021. Order of Dismissal at 7; Cl. Response to Motion to Dismiss at 2-4, 22-25, Exhibits 1, 3, 6. However, the ALJ noted these responses and requests had occurred before ALJ Johnson had remanded her claim to the district director and determined Claimant did not justify her refusals to respond or attend the scheduled examinations since seeking additional benefits in this claim. Order of Dismissal at 7.

⁴ 29 C.F.R. §18.57(b)(1)(v) provides:

(b) *Failure to comply with a judge's order* –

(1) *For not obeying a discovery order.* If a party . . . 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: ***

(v) Dismissing the proceeding in whole or in part[.]

dismissal. Order of Dismissal at 8-10. The ALJ concluded all four factors weighed in favor of dismissal and, therefore, dismissed Claimant's claim with prejudice.⁵ *Id.* at 8-10.

On appeal, now without representation, Claimant generally challenges the ALJ's dismissal of her claim. Employer responds, urging affirmance of the dismissal. Alternatively, Employer requests that the Benefits Review Board remand the case for the ALJ to certify the facts to the appropriate district court for a determination of sanctions pursuant to Section 27(b) of the Act, 33 U.S.C. §927(b). We agree with Claimant that the ALJ's order cannot be affirmed and agree with Employer's suggestion that the case be remanded to the ALJ for consideration under Section 27(b) or, alternatively, for the ALJ to clarify her order in accordance with our opinion below.⁶ *See* Emp. Brief at 10-11.

Section 27(b) provides that if any person disobeys or resists a lawful order of an ALJ or neglects to produce documents after having been ordered to do so, that ALJ shall certify the facts to the appropriate district court for a determination of punishment.⁷ 33

⁵ In considering the four factors, the ALJ found Claimant was "personally responsible" for her failure to cooperate in discovery, refusal to attend an examination with Employer's physician, and her disregard for the ALJ's orders. Order of Dismissal at 8-9. She further found Employer was "substantially prejudiced" by Claimant's inaction, and that Claimant had "deliberately proceeded in a dilatory fashion," resulting in no progress for over seven months. *Id.* at 9-10. Because Claimant did not comply with the ALJ's orders and ignored her counsel's warnings that such actions could lead to sanctions and his withdrawal from the case, the ALJ determined imposing a lesser sanction than dismissal would not have been effective. *Id.* at 9-10.

⁶ While Employer is correct that ALJs have the authority to dismiss claims where a claimant fails to prosecute her claim or due to abandonment, Emp. Brief at 6-10; Emp. Mot. to Dismiss at 5 (citing Fed. R. Civ. P. 41(b)); *see, e.g., Twigg*, 23 BRBS at 120-121; *Taylor*, 22 BRBS at 411-412, here the ALJ dismissed the claim under 29 C.F.R. §18.57 for failure to comply with her lawful orders. Order of Dismissal at 8-10.

⁷ Section 27(b) provides:

If any person in proceedings before a deputy commissioner or Board *disobeys or resists any lawful order or process*, . . . or neglects to produce, after having been ordered to do so, any pertinent book, paper, or document, . . . the deputy commissioner or Board *shall certify the facts to the district court having jurisdiction in the place in which he is sitting* (or to the United States District Court for the District of Columbia if he is sitting in such district) which shall thereupon in a summary manner hear the evidence as to

U.S.C. §927(b); *Goicochea v. Wards Cove Packing Co.*, 37 BRBS 4, 6-8 (2003);⁸ *Creasy v. J.W. Bateson Co.*, 14 BRBS 434, 436-437 (1981). Because the Act contains a provision governing the failure to comply with an ALJ's lawful order, the Office of Administrative Law Judges' Rules of Practice and Procedure (OALJ Rules), 29 C.F.R. Part 18, are not applicable. 33 U.S.C. §927(b); *Goicochea*, 37 BRBS at 6-8; *see also Metro. Stevedore Co. v. Brickner*, 11 F.3d 887, 891 (9th Cir. 1993) ("Ordinarily, when Congress has provided a particular remedy, this court will not imply a different one."). Nevertheless, ALJs retain the authority to dismiss claims where claimants fail to prosecute. Fed. R. Civ. P. 41(b); *see, e.g., Twigg*, 23 BRBS at 120-121; *Taylor*, 22 BRBS at 411-412.⁹

the acts complained of, and if the evidence so warrants, punish such person in the same manner and to the same extent as for a contempt committed before the court, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of or in the presence of the court.

33 U.S.C. §927(b) (emphasis added). In 1972, the Act was amended to add Section 19(d), which provides for the transfer of adjudicative functions from the deputy commissioners (now referred to as district directors) to the Office of Administrative Law Judges. 33 U.S.C. §919(d). Thus, since 1972, ALJs conduct formal hearings and hold the powers and duties granted deputy commissioners under Section 27. *See Percoats v. Marine Terminals Corp.*, 15 BRBS 151, 153-154 (1982).

⁸ In *Goicochea*, the claimant actively pursued his claim but did not comply with the ALJ's order to execute a release of his Immigration and Naturalization Service records to the employer, and the ALJ dismissed the claim with prejudice for failure to comply with that order. *Goicochea*, 37 BRBS at 5-8. The Board vacated the ALJ's dismissal and remanded the case for him to consider whether certification of the facts to the appropriate district court would be proper as Section 27(b) controlled the situation. *Id.* at 6-8.

⁹ The OALJ Rules contain regulations that 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). Moreover, Section 18.10(a) states that, "[t]he Federal Rules of Civil Procedure 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 address an ALJ's authority to dismiss a claim based on a party's failure to prosecute it in the pre-hearing phase. Thus, the ALJ may look to the Federal Rules of Civil Procedure. *Taylor*, 22 BRBS at 411. Rule 41(b) allows for the

In this case, it appears Claimant has almost entirely failed to engage in discovery or otherwise participate in the discovery and administrative process before the ALJ. Because the ALJ discussed the criteria for dismissing a claim due to lack of prosecution but then dismissed the claim due to Claimant's failure to cooperate in discovery and obey lawful orders, her order is confusing and improper. If the ALJ meant to sanction Claimant for disobeying orders, the mechanism is Section 27(b), not 29 C.F.R. §18.57(b)(1)(v). Therefore, the ALJ's reliance on the regulation at 29 C.F.R. §18.57(b)(1)(v) is improper. *Goicochea*, 37 BRBS at 7; Order of Dismissal at 8. If, however, the ALJ intended to dismiss Claimant's claim due to her failure to prosecute her case and participate in the administrative process, then the ALJ's discussion of the disobeyed orders is confusing. Fed. R. Civ. P. 41(b); Order of Dismissal at 8-10. Consequently, we vacate the ALJ's dismissal of Claimant's claim, and we remand the case to the ALJ to clarify whether she intended to dismiss the claim with prejudice as a sanction for failing to follow orders or to dismiss it without prejudice for failure to prosecute. If she intended to dismiss the claim

involuntary dismissal of a claim for, inter alia, failure to prosecute a claim. Fed. R. Civ. P. 41(b); *see Taylor*, 22 BRBS at 411.

with prejudice as a sanction, she must certify the facts to the relevant district court pursuant to Section 27(b).

Accordingly, we vacate the ALJ's Order of Dismissal and Order Canceling Hearing and remand the case for further consideration consistent with our opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

GLENN E. ULMER
Administrative Appeals Judge