



BRB No. 23-0152

DELLAREESE WILSON)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
CERES MARINE TERMINALS)	
)	
Self-Insured)	
Employer-Respondent)	DATE ISSUED: 03/15/2023
)	
CP & O, LLC)	
)	
and)	
)	
PORTS AMERICA INSURANCE)	
COMPANY)	
)	
Employer/Carrier-)	
Respondents)	ORDER

On February 3, 2023, Claimant filed an appeal of Administrative Law Judge (ALJ) Monica Markley’s Order Denying Claimant’s Motion for Continuance and Order Denying Claimant’s Motion for Reconsideration (2022-LHC-01045, 2023-LHC-00016). 33 U.S.C. §921(a); 20 C.F.R. §§802.201, 802.205(a). Claimant’s appeal was assigned the Benefits Review Board’s docket number 23-0152. 20 C.F.R. §802.210.

Ceres Marine Terminals and CP & O (Employers) have each filed a motion to dismiss Claimant’s appeal as interlocutory. 20 C.F.R. §802.401(b). Claimant responds to Employers’ motions to dismiss, asserting they should be denied as premature because she has not had the opportunity to argue the merits of her interlocutory appeal through

submission of her petition for review and brief. We reject Claimant's argument and grant Employers' motions to dismiss this appeal. 20 C.F.R. §802.219(f).

The ALJ, on August 21, 2022, notified the parties she scheduled an in-person formal hearing for February 6, 2023. On February 1, 2023, Claimant filed a motion for continuance of the formal hearing,¹ which the ALJ denied on the same day. Claimant then filed a motion for reconsideration which the ALJ denied on February 3, 2023, prompting Claimant to file her Notice of Interlocutory Appeal of the ALJ's orders with the Benefits Review Board. Noting Claimant's intent to appeal her orders denying a continuance, the ALJ, citing *Colbert v. Nat'l Steel & Shipbuilding Co.*, 14 BRBS 465 (1981),² issued a February 3, 2023 order staying the case in light of pending the disposition of Claimant's interlocutory appeal and cancelling the formal hearing scheduled for February 6, 2023.

Claimant's appeal is of non-final, or interlocutory, orders which neither award nor deny benefits. See 33 U.S.C. §919(c). The Board generally does not undertake interlocutory review of non-final orders. See, e.g., *Newton v. P & O Ports Louisiana, Inc.*, 38 BRBS 23 (2004); *Butler v. Ingalls Shipbuilding, Inc.*, 28 BRBS 114 (1994). The Board will undertake interlocutory review only if the non-final orders conclusively determine a disputed question, resolve an important issue which is completely separate from the merits of the action, and are effectively unreviewable on appeal from a final judgment. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988) ("collateral order doctrine"); *Zaradnik v. The Dutra Group, Inc.*, 52 BRBS 23 (2018). If the order at issue fails to satisfy any one of these requirements, the Board nonetheless may, in its discretion, decide the appeal if necessary to direct the course of the adjudicatory process or if a party has been denied due process of law. 33 U.S.C. §923(a) (Board is not bound by formal rules

¹ Claimant stated the continuance was needed because she had not yet had time to review, or obtain rebuttal evidence to, Dr. Daniel R. Cavazos's January 30, 2023 deposition transcript, which she claimed was taken outside the discovery window.

² In *Colbert*, the Board held that once a party appeals an ALJ's order to the Board, jurisdiction over the case is transferred to the Board, thereby leaving the ALJ without authority to conduct a hearing. *Colbert*, 14 BRBS at 468. Employers, in their motions to dismiss, also request the Board reconsider *Colbert* because it allows a party, such as Claimant in this case, to effectively force a continuance of a hearing before an ALJ by filing an interlocutory appeal. Employers generally assert "nothing in the Longshore Act requires an [ALJ] to be stripped of jurisdiction by an interlocutory appeal," but neither sets forth sufficient analysis of *Colbert* or the Act to warrant overturning Board precedent. Moreover, while Claimant's interlocutory appeal resulted in the hearing being delayed, no party has alleged that such delay fulfilled Claimant's underlying purpose in requesting a continuance: the ALJ's admission of additional evidence into the record.

of procedure); *Pensado v. L-3 Communications Corp.*, 48 BRBS 37 (2014); *Baroumes v. Eagle Marine Services*, 23 BRBS 80 (1989).

Claimant requested the ALJ postpone the hearing to allow her to conduct additional discovery relating to the deposition testimony of Dr. Cavazos, or alternatively, exclude the physician's testimony. The ALJ found Claimant "has not established grounds for a continuance [of the hearing] to reopen discovery" and "exclusion of the deposition transcript is not warranted" because the purpose of the *de bene esse* deposition was to secure Dr. Cavazos' testimony in lieu of his appearance at the hearing; Claimant did not object to the deposition when it was proposed or noticed; his testimony was consistent with his medical report, which Claimant had access to "for some time," with "ample opportunity" to develop evidence in response; and Claimant's counsel did not object or ask any questions at the deposition. Order on Recon. at 2-3.

In response to Employers' motions to dismiss her interlocutory appeal, Claimant generally contends the ALJ's denial of a continuance to enable her to develop additional evidence is an abuse of discretion. The orders Claimant appeals, however, do not satisfy any of the requirements for granting an interlocutory appeal, and Claimant has not identified a need for the Board to direct the course of these proceedings.³ Discovery orders, including those alleged to have resulted in a due process violation or the wrongful exclusion or admission of evidence, are reviewable following a decision on the merits; thus, her appeal does not satisfy the elements of the collateral order doctrine. *See Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 108-109 (2009); *Newton*, 38 BRBS at 25; *Butler*, 28 BRBS 114. Moreover, as Claimant has not shown she will suffer any specific harm as a result of the ALJ's denial of a continuance, the Board need not direct the course of the proceedings below. *Newton*, 38 BRBS at 25.

³ Whether or not Claimant submits a petition for review and supporting brief in this case does not alter the interlocutory nature of her appeal and non-reviewable status of the ALJ's orders. *Baroumes*, 23 BRBS 80. We therefore reject her position that Employers' motions to dismiss are premature and that denial of her interlocutory appeal at this juncture violates her due process.

Accordingly, we grant Employers' motions to dismiss Claimant's appeal of the ALJ's interlocutory orders.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge