

BRB No. 08-0834 BLA

A.W.)	
(Widow of W.W.))	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: 07/15/2009
)	
SOUTHERN OHIO COAL COMPANY)	
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Order of Dismissal of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

A.W., Madsville, West Virginia, *pro se*.

William S. Mattingly and William P. Margelis (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals, without the assistance of counsel, the Order of Dismissal (08-BLA-5100) of Administrative Law Judge Daniel L. Leland rendered on a survivor's claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). Claimant filed her application for benefits on March 13, 2006. Director's Exhibit 3. The district director

¹ Claimant is the surviving spouse of the deceased miner, who died on November 21, 2005. Director's Exhibit 13.

denied benefits on November 14, 2006, because claimant did not establish that the miner had pneumoconiosis, that it arose out of his coal mine employment, and that his death was due to pneumoconiosis. Director's Exhibit 29. Claimant requested a hearing before the Office of Administrative Law Judges (OALJ) on December 13, 2006. Director's Exhibit 30.

The claim was referred to the OALJ on January 29, 2007. Director's Exhibit 33. Administrative Law Judge Michael P. Lesniak issued a Notice of Hearing on July 11, 2007, accompanied by a letter advising claimant that she had the right to have an attorney present for the hearing scheduled for October 18, 2007. Director's Exhibit 36. On September 21, 2007, Judge Lesniak canceled the hearing based upon claimant's telephonic request for a continuance so that she could retain counsel. Director's Exhibit 37. Additionally, Judge Lesniak remanded the case to the district director for identification of employer's counsel. *Id.*

Claimant's claim was again referred to the OALJ on October 31, 2007. Director's Exhibit 39. Administrative Law Judge Daniel L. Leland (the administrative law judge) issued a Notice of Hearing on March 10, 2008, advising the parties that a hearing would be held on July 9, 2008. Accompanying the Notice of Hearing was a letter to claimant, advising her of the right to be represented by counsel at the hearing. The administrative law judge further advised claimant that:

Should you be unable to engage an attorney and need additional time to seek representation, a continuance or postponement may be requested by letter directed to the undersigned at the address shown above. **NOTE: Absent a continuance or postponement being granted by the undersigned, your attendance at the scheduled hearing is mandatory.**

Letter to Claimant dated March 10, 2008. Subsequently, the administrative law judge issued an Order Rescheduling Hearing on March 12, 2008. The rescheduled hearing notice changed only the time of the hearing. On July 9, 2008, at the scheduled time and place of the hearing, employer's counsel appeared but neither claimant nor a representative appeared. Hearing Transcript at 3. Employer moved for dismissal, and the administrative law judge stated that his intent was to issue a show cause order to claimant, providing her the opportunity to explain why she failed to appear. Hearing Transcript at 3-4. Subsequently, the administrative law judge issued an Order to Show Cause on July 10, 2008, directing claimant to:

[S]how cause, in writing, mailed to the address shown in the letterhead above on or before **July 21, 2008**, why she failed to appear at the scheduled hearing. **Failure to respond to this order may result in the claim for**

benefits involved in this matter being dismissed on grounds of abandonment.

Order to Show Cause at 2. Claimant failed to respond to the administrative law judge's Order to Show Cause. Subsequently, on July 29, 2008, the administrative law judge issued his Order of Dismissal, in which he noted that claimant did not respond to the Order to Show Cause. Accordingly, the administrative law judge dismissed the claim because claimant failed to appear at the hearing.

On appeal, claimant contends that the administrative law judge erred in dismissing her claim, because she was advised that she did not have to attend the hearing. Claimant requests a hearing so that she can "state [her] case." Claimant's Appeal Letter. Employer responds, urging affirmance of the administrative law judge's Order of Dismissal. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law.² 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). The Board reviews the administrative law judge's procedural rulings for abuse of discretion. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*).

Under the regulation governing dismissals for cause, "[t]he administrative law judge may, at the request of any party, or on his or her own motion, dismiss a claim: (1) Upon the failure of the claimant or his or her representative to attend a hearing without good cause." 20 C.F.R. §725.465(a)(1). The pertinent regulations, however, first require the administrative law judge to issue an Order to Show Cause why dismissal should not occur and to afford all the parties a reasonable amount of time in which to respond. 20 C.F.R. §725.465(c). Thereafter, the regulations provide the administrative law judge with the discretion to take such action as is appropriate in ruling on the issue. *Id.*

In this case, the administrative law judge provided claimant an opportunity to show good cause for her failure to attend the hearing and a reasonable amount of time to

² The record indicates that the miner's coal mine employment was in West Virginia. Director's Exhibit 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

establish it. *See* Order To Show Cause; 20 C.F.R. §725.465(c). Because claimant failed to appear at the hearing scheduled on July 9, 2008, and did not respond to the administrative law judge's Order to Show Cause, we hold that the administrative law judge's dismissal of her claim for failing to appear at the scheduled hearing was a proper exercise of his discretion.³ *See* 20 C.F.R. §725.465(c); *Clark*, 12 BLR at 1-153; *Clevinger v. Regina Fuel Co.*, 8 BLR 1-1, 1-2 (1985); *Itell v. Ritchey Trucking Co.*, 8 BLR 1-356, 1-359 (1985). Consequently, we hold that the administrative law judge's decision to dismiss this case is in accordance with the law, and, therefore, is affirmed.⁴ 20 C.F.R. §725.465(a)(1), (a)(2), (c); *Clevinger*, 8 BLR at 1-2.

³ Claimant's letter to the Board, appealing the dismissal of her claim, states that she was advised that it was not necessary for her to attend the hearing. However, claimant was advised by the administrative law judge in his Notice of Hearing that attendance at the hearing was mandatory, absent the granting of a continuance or a postponement. Additionally, the administrative law judge advised claimant in his Order to Show Cause that her failure to respond to that order could result in dismissal of her claim.

⁴ If claimant believes that she has evidence relevant to the adjudication of her claim that she wishes to submit, she may seek modification by filing a request with the district director. *See* 20 C.F.R. §725.310.

Accordingly, the administrative law judge's Order of Dismissal is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge