

BRB No. 09-0688 BLA

JAMES D. McKNIGHT)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: 06/14/2010
)	
LONE MOUNTAIN PROCESSING, INCORPORATED)	
)	
and)	
)	
ARCH COAL CORPORATION C/O UNDERWRITERS SAFETY AND CLAIMS)	
)	
Employer/Carrier-Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Order of Dismissal of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Denise M. Davidson (Davidson & Associates), Hazard, Kentucky, for employer.

Emily Goldberg-Kraft (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order of Dismissal (2008-BLA-5048) of Administrative Law Judge Larry S. Merck (the administrative law judge) with respect to a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act).¹ The administrative law judge dismissed the claim after claimant, or a representative, failed to attend the formal hearing and also failed to respond within fifteen days to the administrative law judge's subsequent Order to Show Cause why the claim should not be dismissed for failure to attend the hearing pursuant to 20 C.F.R. §725.465.

On appeal, claimant argues that the administrative law judge's Order of Dismissal should be vacated and the claim remanded for further administrative proceedings because unforeseeable, extenuating circumstances prevented him from both attending the hearing, and responding to the Order to Show Cause within the fifteen days allowed. Employer responds, urging affirmance of the dismissal. The Director, Office of Workers' Compensation Programs, has declined to file a response brief in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's findings must be affirmed if they are rational, supported by substantial evidence, and 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). Regarding procedural issues, the Board reviews the administrative law judge's findings for abuse of discretion. *See Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004)(*en banc*).

¹ On March 30, 2010, the Board issued an order granting the parties the opportunity to submit briefs regarding the potential effects of the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010. *McKnight v. Lone Mountain Processing, Inc.*, BRB No. 09-0688 BLA (Mar. 30, 2010)(unpub. Order). The Director, Office of Workers' Compensation Programs, and employer have responded, asserting that the amendments do not apply to this claim as it was filed before January 1, 2005. We agree that the recent amendments do not apply to the present claim, as it was filed prior to January 1, 2005.

² The record indicates that the miner's last coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

Claimant filed his application for benefits on April 27, 2004, which the district director denied on February 24, 2005, because claimant had not established any element of entitlement. Director's Exhibits 2, 31. Claimant requested a formal hearing before an administrative law judge, and the case was initially transferred to the Office of Administrative Law Judges on May 20, 2005. Director's Exhibits 32, 36. On June 29, 2007, Administrative Law Judge Donald W. Mosser issued an order remanding the case for a complete pulmonary evaluation. Director's Exhibit 39. The district director complied with the order and transferred the case back to the Office of Administrative Law Judges on October 12, 2007. Director's Exhibits 39-40. On November 6, 2008, the administrative law judge issued a Notice of Hearing to claimant and his representative, informing them that the case was scheduled for hearing on April 16, 2009, in Richmond, Kentucky. At the scheduled time and place of the hearing, neither claimant, nor a representative, appeared. Therefore, the administrative law judge issued an Order to Show Cause on April 17, 2009, directing that claimant show cause, within fifteen days from the date of the order, why his claim should not be dismissed for failure to appear at the scheduled hearing.

Claimant did not respond to the administrative law judge's Order to Show Cause. Consequently, on May 12, 2009, the administrative law judge issued his Order of Dismissal, stating that claimant had not responded to the Order to Show Cause. Order of Dismissal at 1. Therefore, the administrative law judge dismissed the claim pursuant to 20 C.F.R. §725.465. *Id.*

Claimant argues that his failure to appear at the hearing and to respond to the Order to Show Cause should have been excused because he was obliged to stay with a family member who was hospitalized at the time of the hearing and for several weeks afterward. Therefore, claimant states that he was not at home to receive the telephone calls from his counsel, but contacted counsel once he discovered the certified letter from his counsel notifying him of the Order to Show Cause. We reject claimant's contention. Pursuant to 20 C.F.R. §725.465:

(a) The 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;

(2) Upon the failure of the claimant to comply with a lawful order of the administrative law judge

20 C.F.R. §725.465(a). The pertinent regulations first require, however, that the administrative law judge issue an Order to Show Cause why dismissal should not occur

and afford all the parties a reasonable amount of time in which to respond. Thereafter, the regulations give the administrative law judge the discretion to take such action as is appropriate in ruling on the issue. 20 C.F.R. §725.465(c).

In this case, the administrative law judge provided claimant with the opportunity to show good cause for his failure to attend the hearing and a reasonable amount of time to make a submission establishing good cause. *See* Order to Show Cause dated April 17, 2009; 20 C.F.R. §725.465(c). Moreover, we note that the Order to Show Cause, sent by certified mail, was received at claimant's home address on April 18, 2009, and by claimant's representative on April 20, 2009. Because neither claimant, nor his representative, appeared at the hearing scheduled on April 16, 2009, and neither responded to the administrative law judge's Order to Show Cause, we hold that the administrative law judge's determination, that claimant did not demonstrate good cause for failing to appear at the scheduled hearing, represented a proper exercise of his discretion. *See* 20 C.F.R. §725.456(c); *Clevinger v. Regina Fuel Co.*, 8 BLR 1-1 (1985); *see also Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Itell v. Ritchey Trucking Co.*, 8 BLR 1-356 (1985). Although claimant provides an explanation to the Board for his absence from the hearing and lack of response to the administrative law judge's Order to Show Cause, claimant has not demonstrated an abuse of discretion by the administrative law judge, who did not receive any communication from claimant or his representative. Consequently, we hold that the administrative law judge's decision to dismiss this case is in accordance with the law, and, therefore, it is affirmed. 20 C.F.R. §725.465(a)(1), (a)(2), (c); *Clevinger*, 8 BLR at 1-2.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge