

BRB No. 06-0519 BLA

LUKE LAWRENCE)	
)	
Claimant-Petitioner)	
)	
v.)	
)	DATE ISSUED: 11/29/2006
DRUMMOND COMPANY,)	
INCORPORATED)	
)	
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 Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Luke Lawrence, Birmingham, Alabama, *pro se*.

John A. Smyth (Maynard, Cooper & Gale), Birmingham, Alabama, for employer.

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy 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: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Order of Dismissal (05-BLA-5480) of Administrative Law Judge Ralph A. Romano rendered on a 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 his claim for benefits on October 31, 2003. Director's Exhibit 4. By order issued February 23, 2006, the administrative law judge granted a Motion to Dismiss filed by employer.

On appeal, claimant challenges the dismissal of his claim. Employer has not responded to claimant's appeal. The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand, asserting that the administrative law judge erred in dismissing this claim. The Director requests that we vacate the Order of Dismissal and remand this case for the administrative law judge to reconsider employer's motion to dismiss under the proper regulatory procedure.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176, 1-177 (1989). The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 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).

On January 25, 2005, employer filed a motion to dismiss the claim pursuant to 20 C.F.R. §§725.409 and 725.465, alleging that claimant failed to keep appointments with employer's medical expert on two different occasions, and therefore effectively abandoned the claim.¹ Claimant did not respond to employer's motion.² The administrative law judge granted employer's motion and dismissed the claim on February 23, 2006. In its entirety, the administrative law judge's dismissal order states as follows:

Hearing in this matter is scheduled for February 28, 2006 in Birmingham, Alabama. Upon Employer's unopposed Motion to Dismiss submitted on

¹ Employer alleged that the first appointment was scheduled with its expert for September 19, 2005, but claimant failed to attend. Employer's Motion to Dismiss, Exhibit A. Employer alleged that a second appointment was scheduled for January 23, 2006, but claimant again failed to keep the appointment. Employer's Motion to Dismiss, Exhibit B.

² The record indicates that on January 18, 2006, claimant's attorney notified the administrative law judge that he no longer represented claimant.

January 25, 2006, it is hereby ORDERED that the hearing scheduled for February 28, 2006 is CANCELLED. It is further ORDERED that this matter is DISMISSED.

In the Director's Motion to Remand, the Director alleges that the administrative law judge did not follow the required regulatory procedure to properly dismiss a claim. Specifically, the Director notes that under 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; or
- (3) Where there has been a prior final adjudication of the claim or defense to the claim under the provisions of this subchapter and no new evidence is submitted

20 C.F.R. §725.465(a). Additionally, “[i]n any case where a dismissal of a claim . . . is sought, the administrative law judge shall issue an order to show cause why the dismissal should not be granted and afford all parties a reasonable time to respond to such order.” 20 C.F.R. §725.465(c).

As the Director notes, the record does not indicate that claimant failed to attend a hearing without good cause, nor does it indicate that he failed to comply with a lawful order of the administrative law judge. *See* 20 C.F.R. §725.465(a)(1),(2). Further, the record indicates that new medical evidence was submitted in claimant's current claim for benefits. *See* 20 C.F.R. §725.465(a)(3); Director's Exhibit 13. Therefore, the record does not support dismissal under 20 C.F.R. §725.465(a). In addition, as the Director correctly points out, the administrative law judge did not issue a show cause order before dismissing the claim, as required by 20 C.F.R. §725.465(c). Therefore, we vacate the administrative law judge's Order of Dismissal and remand this case for him to reconsider employer's Motion to Dismiss.

Accordingly, the Director's Motion to Remand is granted, the administrative law judge's Order of Dismissal is vacated, and this case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge