

BRB No. 00-0198 BLA

ROSE ELLEN LINSKY)	
(On Behalf of And As The Widow of)	
PETER W. LINSKY))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DONALDSON MINING COMPANY)	
)	DATE ISSUED:
Employers-Respondent)	
)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Order of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Mary Rich Maloy (Jackson & Kelly PLLC), Charleston, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant¹, without the assistance of counsel, appeals the Order of Dismissal (1997-

¹Claimant is Rose Ellen Linsky, the widow of Peter W. Linsky, the miner. The miner filed claims for benefits on June 8, 1987 and February 15, 1989 which were denied on November 24, 1987 and July 11, 1989, respectively. Director's Exhibit 43. The miner filed a third claim on November 17, 1996 which was initially denied on May 13, 1997. Director's Exhibits 1, 15. The miner died on April 22, 1997 and claimant requested a hearing on the

BLA-1647) of Administrative Law Judge Gerald M. Tierney dismissing a miner's and 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). The administrative law judge, in an Order dated September 23, 1999, found that neither claimant nor a representative appeared at the formal hearing on August 5, 1999 in Charleston, West Virginia and did not respond to the subsequent Order to Show Cause why the case should not be dismissed. Accordingly, the claim was dismissed. On appeal, claimant generally contends that the administrative law judge erred in dismissing the claim. Employer responds, urging affirmance of the dismissal. The Director, Office of Workers' Compensation Programs, responds, declining to submit a brief on appeal.

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. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). 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. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On August 13, 1999 the administrative law judge issued an Order to Show Cause why the claim should not be dismissed in which he stated that neither claimant nor a representative were present when the case was called. In her notice of appeal, claimant stated that she appeared at the hearing on August 5, 1999 in Charleston, West Virginia and that she did not have a representative to appear on her behalf. Additionally, employer's counsel submitted a letter dated August 23, 1999 stating that she received the Order to Show Cause and that her notes from the hearing reflect that the administrative law judge continued the

miner's claim on April 28, 1997. Director's Exhibit 17. Claimant filed a survivor's claim on May 1, 1997 which was initially denied on May 15, 1997. Director's Exhibit 34. Claimant protested the denial of the survivor's claim on May 21, 1997 and the claim was referred to the Office of the Administrative Law Judges for a hearing on July 25, 1997. Director's Exhibits 35, 44. A hearing was initially scheduled for March 10, 1999, but rescheduled for May 21, 1999 and then, after a cancellation notice was sent on May 17, 1999, again rescheduled for August 5, 1999.

hearing in order to permit claimant to look for an attorney. Other than stating that neither claimant nor a representative appeared at the hearing, the administrative law judge does not discuss, in his Order dismissing the claim, employer's observation that the hearing was continued in order to permit claimant to seek counsel. In light of the statements indicating that claimant may have attended the hearing and, counsel for employer's indication that a continuance was granted, we vacate the Order dismissing the claim and remand the case for the administrative law judge to reconsider if dismissal was proper under the circumstances presented in this case. *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985); *Luketich v. Bethlehem Mines Corp.*, 2 BLR 1-393 (1979).

Accordingly, the administrative law judge's Order dismissing the claim is vacated and the case is remanded to the administrative law judge for further findings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge