

BRB No. 04-0123 BLA

EDWARD LEE KENDRICK)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
ISLAND CREEK COAL COMPANY)	DATE ISSUED: 09/30/2004
)	
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 Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Edward Lee Kendrick, Melvin, Kentucky, pro se.

Natalee A. Gilmore (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the October 7, 2003 Order of Dismissal (03-BLA-5635) of Administrative Law Judge Robert L. Hillyard 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).¹ Claimant filed this subsequent claim on April 9, 2001. Claimant's counsel motion to withdraw from representation was granted by the administrative law judge by order dated May 14, 2002. Employer scheduled a medical examination of claimant with Dr. Castle for July 30, 2003 in Virginia, which claimant did not attend. Employer then filed a Motion to Dismiss or to Compel Examination on September 3, 2003, requesting that the administrative law judge either compel claimant to undergo a medical examination or dismiss the claim. Claimant, with employer's counsel, rescheduled an appointment with Dr. Repsher for September 25, 2003 in Kentucky, which was confirmed by letter from employer's counsel dated September 5, 2003. The administrative law judge, presumably unaware of this rescheduled appointment, issued a Show Cause Order on September 9, 2003 in response to employer's motion. The administrative law judge therein ordered claimant to show cause "in writing," on or before September 24, 2003, why he should not be compelled to undergo an examination by a physician chosen by employer, or alternatively, why his claim should not be dismissed due to his failure to attend the scheduled exam with Dr. Castle on July 30, 2003. Claimant did not respond to the Show Cause Order, and on October 7, 2003, the administrative law judge dismissed the claim.

Claimant challenges the administrative law judge's October 7, 2003 Order of Dismissal. The Director, Office of Workers' Compensation Programs (the Director), responds, arguing that the administrative law judge was not aware of all the facts before he dismissed the claim, including the fact that on September 5, 2003 employer rescheduled claimant's appointment to September 25, 2003 with Dr. Repsher. Employer responds that it would be improper for the Board to interfere with the administrative law judge's clear directive for claimant to respond to the Show Cause Order in writing. Because claimant did not respond to the Show Cause Order, employer urges the Board to affirm the administrative law judge's Order of Dismissal.

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. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence,

¹ The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

and in accordance with 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).

Claimant challenges the administrative law judge’s Order of Dismissal, asserting that he did not anticipate that the formal hearing would be cancelled for failure to respond to the Show Cause Order and stating his belief that the rescheduling of his medical appointment by employer’s counsel “would solve the problem.” Claimant’s Statement at 1. Claimant explains that he did not keep the appointment with Dr. Castle in Virginia on July 30, 2003 on account of his terminally-ill wife’s medical treatments. Claimant further asserts that he kept the appointment with Dr. Repsher for September 25, 2003.

The administrative law judge may not have been aware, at the time he issued his Order of Dismissal on October 7, 2003, that claimant had rescheduled an exam for September 25, 2003 with Dr. Repsher. Thus the administrative law judge did not have before him all the relevant facts to determine if claimant complied with his Show Cause Order. Consequently, we vacate the administrative law judge’s October 7, 2003 Order of Dismissal. We remand the case to the administrative law judge for him to reconsider the appropriateness of dismissal in this claim, based on all the relevant facts. *See* 20 C.F.R. §§725.414(a)(3)(i)(B), 725.465, 725.466.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge