BRB Nos. 14-0277 and 14-0375
OWCP No. 02-233683

MARIA JORDAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DYNCORP INTERNATIONAL, L.L.C.	)	DATE ISSUED: Aug. 25, 2014
	)	
	)	
Self-Insured Employer-Respondent	)	ORDER

The Board acknowledges claimant's timely appeal, mailed July 22, 2014, and received July 24, 2014, of Administrative Law Judge Lee J. Romero, Jr.'s Order Granting Motion to Quash Subpoenas. This Order was served by the administrative law judge on June 23, 2014. 33 U.S.C. §921(b); 20 C.F.R. §§802.205, 802.207(b). Claimant's appeal is assigned the Board's docket number 14-0375. All correspondence pertaining to this appeal must bear this number. 20 C.F.R. §802.210.

In addition, claimant has timely filed a motion for reconsideration of the Board's Order in which the Board dismissed as interlocutory claimant's appeal of the administrative law judge's Order Granting in Part and Denying in Part Employer's Motion to Quash Subpoenas and Second Motion to Quash Subpoenas. *Jordan v. DynCorp Int'l, LLC*, BRB No. 14-0277 (June 26, 2014). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. Employer responds that claimant's motion for reconsideration should be denied.

Both claimant's prior and current appeals are of the administrative law judge's interlocutory orders granting employer's motions to quash subpoenas. In his first Order, dated May 1, 2014, the administrative law judge observed that an informal conference had not yet taken place before the district director, that the claim had not been referred to the Office of Administrative Law Judges (OALJ), that claimant's counsel was engaging in discovery which usually takes place after a claim has been referred to the OALJ for adjudication, and that claimant's use of subpoenas "borders on an abuse of the process designed to promote the investigatory process associated with the informal conference." May 1, 2014 Order at 4. On May 6, 2014, the district director held an informal conference, and recommended that claimant's Section 49, 333 U.S.C. §948a, discrimination claim be denied. The Memorandum of Informal Conference informed the

parties that they may file pre-hearing statements with the district director in order to effectuate referral of the claim to the OALJ.

Claimant apparently did not seek referral of the claim to the OALJ, but filed subpoenas for more information, which employer moved to quash. The administrative law judge's grant of the motion to quash is the subject of claimant's new appeal. The gravamen of claimant's appeals is that, in a claim of discrimination under Section 49, the district director should have before him all available evidence prior to conducting an informal conference, citing 20 C.F.R. §702.271(b).[1] Claimant contends that by granting employer's motions to quash, the administrative law judge has denied her right to due process of law.

The Board generally does not undertake interlocutory review of orders granting or denying discovery motions, because the orders may be reviewed on appeal from a final decision and order. *See, e.g., Newton v. P & O Ports Louisiana, Inc.*, 38 BRBS 23 (2004); *Tignor v. Newport News Shipbuilding & Dry Dock Co.*, 29 BRBS 135 (1995); *Butler v. Ingalls Shipbuilding, Inc.*, 28 BRBS 114 (1994). The Board will undertake interlocutory review if it is necessary to address the course of the adjudicatory process or if a denial of a party's due process rights are at issue. *See, e.g., Pensado v. L-3 Communications Corp.*, 48 BRBS 37 (2014); *Baroumes v. Eagle Marine Services*, 23 BRBS 80 (1989); *Niazy v. The Capital Hilton Hotel*, 19 BRBS 266 (1987).

Claimant asserts that the administrative law judge's orders quashing the subpoenas deprive her of due process because it inhibits the district director from fully investigating, and rendering a decision on, her claim. We reject claimant's contention that her right to due process has been denied at the informal level. Notwithstanding the regulation at 20 C.F.R. §702.271(b), we do not perceive any material difference as to the role played by the district director in a discrimination claim as opposed to a disability claim. Indeed, Section 702.271(c) states, "If circumstances warrant, the district director may also conduct an informal conference on the [discrimination] issue as described in §§702.312

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[1] Section 702.271(b) states:

> When a district director receives a complaint from an employee alleging discrimination as defined under section 49, he or she shall notify the employer, and within five working days, initiate specific inquiry to determine all the facts and circumstances pertaining thereto. . . .

20 C.F.R. §702.271(b). If the district director issues an informal recommendation with which any party does not agree, the case is to be referred to the OALJ. 20 C.F.R. §702.272(b). An administrative law judge "is responsible for final determinations of all disputed issues connected with the discrimination complaint . . . ." 20 C.F.R. §702.273.

through 702.314." 20 C.F.R. §702.271(c). The district director's role is to, inter alia, facilitate the informal resolution of a claim. *See, e.g., Sans v. Todd Shipyards Corp.*, 19 BRBS 24 (1986). The district director's recommendation is not binding; the administrative law judge's decision is to be de novo, based on evidence admitted into the record by the administrative law judge. *Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988). Contrary to claimant's contention, Section 19(c) of the Act, 33 U.S.C. §919(c), does not apply to the informal proceedings before the district director. *See, e.g., Sullivan v. St. John's Shipping Co., Inc.*, 36 BRBS 127 (2002). Rather, pursuant to Section 19(d) of the Act, 33 U.S.C. §919(d), all "powers, duties, and responsibilities" concerning hearings under the Act are vested in administrative law judges, and the Administrative Procedure Act applies to these formal adjudications. *See, e.g., Durham v. Embassy Dairy*, 40 BRBS 15 (2006); *Carter v. Merritt Ship Repair*, 19 BRBS 94 (1986); *Sans*, 19 BRBS 24; *Neal v. Strachan Shipping Co.*, 1 BRBS 279 (1974).

As this case has not been referred to an administrative law judge for formal adjudication, the administrative law judge's order quashing subpoenas has not deprived claimant of her right to have her claim fully heard and addressed. *See generally Kreschollek v. Southern Stevedoring Co.*, 223 F.3d 202, 34 BRBS 48(CRT) (3d Cir. 2000). The administrative law judge properly noted that the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges address the scope of discovery and requests therefor, 29 U.S.C. §§18.13-24; *see also* 33 U.S.C. §§923(a); 927, and the administrative law judge's rulings on discovery matters, once the claim is properly before him, must protect the parties' due process rights.[2] *See, e.g., Ion v. Duluth, Missabe & Iron Range Ry. Co.*, 31 BRBS 75 (1997) (administrative law judge erred in failing to allow employer to cross-examine claimant or respond to his post-hearing affidavit concerning his diligent job search); *Cornell v. v. Lockheed Aircraft Int'l*, 23 BRBS 253 (1990) (administrative law judge's failure to compel production of highly relevant evidence was so prejudicial as to result in a denial of due process). Thus, it is premature for claimant to assert that her due process rights have been abridged, and we need not entertain the interlocutory appeal on this basis. *Cf. Niazy*, 19 BRBS 266 (Board accepted appeal where procedural due process rights were at stake). Moreover, as claimant apparently has not sought to invoke the Act's formal adjudication process, it similarly is premature to assert that the Board must direct the course of the adjudicatory process. *Cf. Baroumes*, 23 BRBS 80 (Board accepted appeal of administrative law judge's disqualification of counsel); *see also L.D.* [*Dale*] *v. Northrop Grumman Ship Systems, Inc.*, 42 BRBS 46, *denying recon. in* 42 BRB 1 (2008). Therefore, we will not

[2] The regulations governing formal hearings state that the administrative law judge "shall inquire fully into the matters at issue and shall receive in evidence the testimony of witnesses and any documents which are relevant and material to such matters," 20 C.F.R. §702.338, and that the administrative law judge must conduct the hearing "in such a manner as to best ascertain the rights of the parties," 20 C.F.R. §702.229.

undertake interlocutory review of the administrative law judge's orders quashing claimant's subpoenas. Any adverse interlocutory discovery orders are fully reviewable after the administrative law judge issues a final compensation order. *See, e.g.*, *Tignor*, 29 BRBS 135.

Accordingly, claimant's motion for reconsideration in BRB No. 14-0277 is denied. 20 C.F.R. §802.409. Claimant's appeal in BRB No. 14-0375 is dismissed.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge