



BRB No. 16-0235

RACHEL COMFORT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MISSION ESSENTIAL PERSONNEL	)	DATE ISSUED: <u>Feb. 24, 2017</u>
	)	
and	)	
	)	
ZURICH AMERICAN INSURANCE	)	
COMPANY	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeal of the Amended Decision and Order Dismissing Case of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Rachel Comfort, Nashville, Tennessee.

Chase H. Zobec (Schouest, Bamdas, Soshea & BenMaier P.L.L.C.), Boca Raton, Florida, for employer/carrier.

Before: BOGGS, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant, appearing without representation, appeals the Amended Decision and Order Dismissing Claim (2015-LDA-00147) of Administrative Law Judge Richard M. Clark rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). We will review the administrative law judge's dismissal of claimant's claim under the abuse of discretion standard. *See, e.g., Goforth v.*

*Owens*, 766 F.2d 1533 (11th Cir. 1985); *Taylor v. B. Frank Joy, Co.*, 22 BRBS 408 (1989).

The alleged events leading to this appeal have been gleaned from the employer's filings with the administrative law judge, the administrative law judge's orders, and the parties' pleadings filed with the Board. Claimant alleges that, on March 5, 2009, she injured both of her knees during a rocket attack on the base where she was employed by employer as a linguist in Afghanistan. Employer returned claimant to the United States for medical treatment. Claimant filed a claim for benefits under the Act as a dispute arose over employer's liability for medical treatment and disability benefits.

Following a June 4, 2014 informal conference, claimant's claim was transferred to the Office of Administrative Law Judges (OALJ). On October 15, 2014, claimant, without the benefit of counsel, filed her LS-18 Pre-Hearing Statement with the district director who, on December 4, 2014, sent this form to the OALJ. On this form, claimant gave an address in Nashville, Tennessee.<sup>1</sup> Employer filed two LS-18 forms with the administrative law judge: one dated August 21, 2014 and another dated January 6, 2015.

On January 6, 2015, employer served claimant with interrogatories and a request for production of documents. Employer's counsel was in contact with claimant via letter and telephone about her non-compliance with his discovery efforts; employer alleged that claimant did not respond to its discovery requests until June 1, 2015. At this time, claimant notified employer, but apparently not the district director or the OALJ, that she had moved to Fort Worth, Texas. In July 2015, claimant allegedly agreed to be deposed by employer's counsel in Fort Worth on August 4, 2015. Employer subsequently issued a "Notice of Deposition – Duces Tecum" to claimant on July 22, 2015, which he mailed to claimant's Fort Worth address. Employer's counsel traveled from Florida to Texas for the scheduled deposition, but claimant did not appear, later informing employer's counsel that she had moved back to Nashville, Tennessee "the day before" because she was no longer welcome at the home at which she was residing in Fort Worth.<sup>2</sup>

On August 6, 2015, citing claimant's lack of cooperation with the discovery process, employer filed with the administrative law judge a motion to dismiss and, alternatively, a motion to compel claimant's deposition. Employer mailed these motions to claimant's Nashville #1 and Fort Worth addresses. Claimant did not respond to these motions, as she was apparently residing temporarily at this time at a mosque in

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<sup>1</sup> As claimant subsequently used different Nashville addresses, in order to distinguish among them, we will refer to this address as Nashville #1.

<sup>2</sup> Claimant presently disputes employer's assertion that she had agreed to be deposed on August 4, 2015.

Nashville.<sup>3</sup> In an Order dated September 14, 2015, the administrative law judge denied employer's motion to dismiss,<sup>4</sup> but granted its motion to compel, stating that "there is no dispute that Claimant failed to attend her deposition," that "Claimant had appropriate notice and willfully failed to appear . . . and did not notify Employer that she had relocated . . . [and] would not attend . . . her deposition," and that her behavior "is inexcusable and borders on bad faith." After admonishing claimant that she has a duty to cooperate, to respond to motions and orders, and to keep her contact information current with "both Employer and this Office," the administrative law judge further stated:

If Claimant fails to keep her contact information current, she will be charged with having received the documents sent to her last known address whether she receives them or not. Upon a proper motion and after an opportunity to be heard, Claimant's failure to respond to motions or other notices sent in this matter may result in her case being dismissed for failure to prosecute her claim.

Order to Compel at 2. The administrative law judge ordered claimant and employer to confer and to agree, within 14 days, on a date for claimant's deposition, and he ordered claimant to provide employer and his office with her current address and phone number within seven days. The service sheet attached to this Order indicates that it was sent via regular mail to claimant's Nashville #1 address.<sup>5</sup> On September 21, 2015, the

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<sup>3</sup> Claimant avers that she told employer's counsel of her housing circumstances, specifically her temporary residence upon her return to Nashville, but that counsel "refused to accept it" because it was a "public address" and not a residential address. In its brief in response to claimant's appeal, employer acknowledges that,

[a]t one point, one of Claimant's friends contacted the employer/carrier and provided the address for a local Mosque in Nashville, TN. This is evidenced by a Voicemail from the Petition[er] on February 5, 2016. This address, however, was never confirmed by the Petitioner and never provided to ALJ Clark or the OWCP as required by ALJ Clark's Order.

Emp. Br. at 5. We will refer to the mosque address as Nashville #2.

<sup>4</sup> In denying employer's Motion to Dismiss, the administrative law judge stated that "at this time," such a serious sanction was not warranted.

<sup>5</sup> On September 18, 2015, employer mailed a copy of the administrative law judge's Order to claimant's Fort Worth address. In a letter accompanying the Order, employer also asked claimant to provide her updated address so that her deposition could be scheduled.

administrative law judge issued a standard Notice of Calendar Call and Pre-Hearing Order listing claimant's case, and others, for a calendar call in Nashville on January 12, 2016. This was mailed to claimant's Nashville #1 address.

On October 15, 2015, employer's counsel filed with the administrative law judge a second motion to dismiss in which he stated that he had spoken to claimant by telephone and that she had refused to provide him with either her address or a date for her deposition. Employer sent a copy of its motion to claimant's Nashville #1, Fort Worth, and e-mail addresses. Claimant did not respond to this motion.

On November 4, 2015, the administrative law judge issued an Order to Show Cause Why Matter Should Not Be Dismissed, noting that neither his September 14, 2015, nor his September 21, 2015, Orders had been "returned to sender." The administrative law judge stated that claimant's unwillingness to provide employer with updated contact information and her failure to respond to the administrative law judge's orders "suggest that Claimant has abandoned her claim," and that, moreover, claimant could be subject to sanctions for failure to comply with his orders and to participate in discovery. The administrative law judge ordered claimant to show cause within 14 days why her claim should not be dismissed; additionally, this Order gave claimant specific instructions on how to respond and concluded that claimant's failure to respond in writing would result in the dismissal of her claim. The administrative law judge served this Order on claimant by regular mail at her Nashville #1 address.

On November 23, 2015, employer moved to dismiss claimant's claim with prejudice due to claimant's failure to comply with the administrative law judge's Show Cause Order. Employer sent this motion to claimant's Nashville #1 and Fort Worth addresses. Claimant did not respond to the motion.

On December 2, 2015, the administrative law judge issued a Decision and Order Dismissing Case wherein, after reciting the procedural history of the case, finding that claimant failed to respond in any way, and noting that no documents had been returned to his office as undeliverable, he stated:

Claimant has not made any effort to respond, appear, object, cooperate, or otherwise make her intentions known in this matter. Her unwillingness to provide Employer with updated contact information, her failure to respond to the Employer's Motion and the September 14, 2015, Order, and her failure to act on the September 21, 2015, Order suggest that Claimant has abandoned her claim. Moreover, her failure to comply with my orders and otherwise participate in the discovery process subject her to sanctions under

29 C.F.R. § 18.57. . . . Claimant has unreasonably failed to participate in the process, has unreasonably failed to respond to motions and requests made by Employer, and has refused to respond to orders from this Office. She has refused to attend her own deposition.

Decision and Order at 4. The administrative law judge concluded:

Claimant has refused to participate in the hearing process for the case she referred for hearing. She has refused to comply with at least four orders issued by me and has not otherwise appeared to represent herself on these claims or make her intentions known. Based upon Claimant's failure to participate in this process and her failure to respond to discovery requests and attend her own deposition, this matter is hereby dismissed. All dates are vacated.

*Id.*<sup>6</sup>

On December 4, 2015, claimant telephoned the administrative law judge's office and provided her then current Nashville address to him.<sup>7</sup> *See* Order Denying Recon. at 1. On December 10, 2015, the administrative law judge, without referencing claimant's December 4, 2015, telephone communication, issued an Amended Decision and Order

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<sup>6</sup> In a footnote, the administrative law judge stated:

This case is not an appropriate case to refer to the District Court for contempt sanctions under Section 27(b). 33 U.S.C. § 927(b); *Goicochea v. Wards Cove Packing Co.*, 37 BRBS 4, 7-8 (2003) (holding that Section 27(b) provides the sanction where a party has failed to obey lawful process or an ALJ order). In *Goicochea*, the Claimant refused to comply with a specific order to sign a release for records and was recalcitrant in the discovery process. *Id.* at 6. Here, Claimant has failed to participate in the process and, while she has ignored orders, she has not specifically refused to comply as occurred in *Goicochea*. Dismissal here is based on Claimant's abandonment of her claim and is not a sanction for failure to abide by any lawful order. Sending the matter to the District Court for contempt where Claimant has not otherwise appeared in this matter would waste the District Court's time and resources.

Decision and Order at 3 n.1

<sup>7</sup> We will refer to this address as Nashville #3.

Dismissing Case. In this amended decision, the administrative law judge added a case citation and stated that claimant's claim was dismissed with prejudice. The service sheet attached to this Amended Decision and Order indicates that it was sent by the district director via certified mail to claimant's Nashville #1 address.<sup>8</sup> Upon subsequently learning of claimant's Nashville #3 address, the district director re-served the administrative law judge's Amended Decision and Order there on January 22, 2016.

Claimant timely appealed the administrative law judge's Amended Decision and Order Dismissing Case to the Board, with reference to the January 22, 2016 date the district director filed and served the decision on claimant at her Nashville #3 address. 33 U.S.C. §921; 20 C.F.R. §802.201. Appended to claimant's notice of appeal are statements, purportedly from persons residing at the Nashville #1 and Fort Worth addresses, which aver that claimant did not receive any mail at those addresses. Employer responds to claimant's appeal contending that the administrative law judge's dismissal of claimant's claim should be upheld.

Claimant also sent to the administrative law judge the same letter and attachments that she sent to the Board. The administrative law judge interpreted claimant's submission as a motion for reconsideration and he issued an Order Denying Reconsideration dated March 8, 2016, in which he found: 1) that claimant's motion for reconsideration was untimely because it was not filed within 10 days of the filing of his Amended Decision and Order; 2) that jurisdiction over this case now rested with the Board pursuant to claimant's appeal; and 3) that even if claimant's motion for reconsideration was timely, it would be denied.<sup>9</sup> The district director served this Order on claimant at her Nashville #3 address.

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<sup>8</sup> The certified mail receipt numbers corresponding to the district director's first attempts at serving the December 2 Decision and Order and the December 10 Amended Decision and Order indicate that the documents were "undeliverable" to claimant's Nashville #1 address. *See* discussion, *infra*.

<sup>9</sup> Specifically, the administrative law judge stated that claimant had not justified her failure to comply with his Orders, her failure to attend her own deposition, or to participate in discovery. The administrative law judge further stated that:

She has also not otherwise provided any persuasive evidence or information that she was not aware of the orders issued in her case, and I am not convinced that she did not receive any of the orders issued in this matter. None of the prior orders have been returned to this office, and we had her current address [Nashville #3] on file as of December 4, 2015.

For the following reasons, we conclude that the administrative law judge prematurely ordered the dismissal of claimant's claim with prejudice. The administrative law judge dismissed claimant's claim with prejudice "based on Claimant's abandonment of her claim." *See* Amended Decision and Order Dismissing Case at 3 n.2. In rendering this judgment, the administrative law judge stated that claimant "failed to participate in the process, . . . failed to respond to motions and requests made by Employer, and has refused to respond to orders from this Office." He further stated that claimant had not made "any effort to respond, appear, object, cooperate, or otherwise make her intentions known in this matter." *Id.* at 4. The administrative law judge's conclusion that claimant failed to participate in the process was based on the finding that claimant must have received his prior orders because none of the administrative law judge's mailings to claimant were "marked as undeliverable or returned to sender." *Id.*

The documents filed with the Board, and belatedly with the administrative law judge, however, are not indicative of a claimant who has demonstrated the intent to relinquish her claim. It is apparent that claimant did not keep the OALJ and district director apprised of her whereabouts as she moved from Nashville to Fort Worth and back to Nashville, nor did she respond to the administrative law judge's orders to compel and to show cause. However, claimant telephoned the administrative law judge on December 4, 2015, two days after the date of the initial dismissal order, giving her Nashville #3 address. The administrative law judge did not disclose this fact in his subsequently issued December 10, 2015, Amended Decision and Order, which was sent to claimant's Nashville #1 address; he first mentioned the call in his Order Denying Reconsideration. *See* n. 9, *supra*. This December 4 telephone call arguably is evidence of claimant's intent to proceed with her claim.<sup>10</sup> Moreover, when claimant ultimately was served with the Amended Decision and Order at her Nashville #3 address, she filed documents with the Board and the administrative law judge indicating her belief that her claim is meritorious.

In addition, unbeknownst to the administrative law judge at the time he dismissed the claim, his Amended Decision and Order, which was sent to claimant at her Nashville #1 address via certified mail by the district director on December 16, 2015, was marked as "Undeliverable as Addressed" and was thereafter not served on claimant at her

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<sup>10</sup> It is not clear what prompted claimant to call the administrative law judge. The administrative law judge stated that, on December 4, 2015, claimant informed him of her correct Nashville #3 address. *See* Order Denying Recon. at 1. Nonetheless, this information was not immediately made known to the district director, who served the Amended Decision and Order on claimant at her Nashville #1 address.

Nashville #3 address until January 22, 2016.<sup>11</sup> This demonstrates that perhaps the administrative law judge erroneously concluded that claimant had received all the prior motions and orders.<sup>12</sup> In addition, employer concedes that although it may not have had claimant's current address at all times, it was in periodic telephonic communication with claimant, *see, e.g.*, Emp. Br. at 35, and claimant contends in her pleadings to the Board that she kept employer's counsel apprised of her moves.<sup>13</sup> *See* n. 3, *supra*. Taken as a whole, these events cannot support a finding that claimant clearly intended to abandon her claim.

The administrative law judge's statements that claimant failed "to participate in this process" suggest the dismissal was based on claimant's failure to prosecute her claim. The Rules of Practice and Procedure for the Office of Administrative Law Judges (OALJ Rules) contain regulations that apply in proceedings under the Act to the extent they are not inconsistent with either the Act itself or the Act's regulations. 29 C.F.R. §18.10(a) (2016). Moreover, Section 18.10(a) states that, "The Federal Rules of Civil Procedure (FRCP) apply in any situation not provided for or controlled by these rules, or a governing statute, regulation, or executive order." Neither the Act, its implementing regulations, nor the OALJ Rules address the administrative law judge's authority to dismiss a claim based on a party's failure to prosecute it in the pre-hearing phase. *But see* 29 C.F.R. §18.21(c) (administrative law judge may, "after notice and an opportunity to be heard, dismiss the proceeding or enter a decision and order without further proceedings if the party fails to establish good cause for its failure to appear" at the scheduled hearing). Thus, the administrative law judge may look to the Federal Rules of Civil Procedure. *Taylor*, 22 BRBS 408. Rule 41(b) allows for the involuntary dismissal of a claim for,

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<sup>11</sup> This information is contained on a USPS tracking sheet attached to claimant's appeal to the Board. The tracking number matches the one on the district director's Certificate of Filing and Service, and has been verified by the Board on the USPS website.

<sup>12</sup> As indicated, claimant has sent to the Board two statements to the effect that claimant had not received mail at the Nashville #1 and Fort Worth addresses. Because the administrative law judge sent his interlocutory orders to claimant by regular mail, there is no tracking system available to ascertain the delivery status of the orders.

<sup>13</sup> It appears that claimant may be confused about the role of employer's counsel, Mr. Zobec, in this matter, as her February 8, 2016 letter to the Board refers to him as "my attorney." Claimant is advised that Mr. Zobec is the attorney for the employer/carrier and is not representing her interests.

inter alia, failure to prosecute a claim. Fed. R. Civ. P. 41(b);<sup>14</sup> *see Taylor*, 22 BRBS 408.<sup>15</sup>

Dismissal for failure to prosecute, however, has been described as a severe measure of last resort that should be granted only in “extreme situations,” such as a plaintiff’s “clear record of delay or contumacious conduct.” *See Morewitz v. West of England Ship Owners Mut. Prot. & Indem. Ass’n (Luxembourg)*, 62 F.3d 1356, 1366 (11th Cir. 1995), *cert. denied*, 516 U.S. 1114 (1996); *Lewis v. Rawson*, 564 F.3d 569 (2d Cir. 2009) (dismissal for lack of prosecution is a “harsh remedy” that should be “utilized only in extreme situations); *Delta Theatres, Inc. v. Paramount Pictures, Inc.*, 398 F.2d 323 (5th Cir. 1968), *cert. denied*, 393 U.S. 1050 (1969) (dismissal should be permitted only in the face of a clear record of delay or contumacious conduct by the plaintiff.). In this regard, the United States Court of Appeals for the Eleventh Circuit stated in *McKelvey v. AT & T Tech., Inc.*, 789 F.2d 1518, 1520 (11th Cir. 1986) that “[a] finding of such extreme circumstances to support the sanction of dismissal must, at a minimum, be based on evidence of willful delay; simple negligence does not warrant dismissal.” Additionally, in *Gunn v. Newsome*, 881 F.2d 949 (11th Cir. 1989), *cert. denied*, 493 U.S. 993 (1989), the court wrote in another context that petitioners without representation do not “stand in the same position as counseled petitioners;” thus, courts should not “impose on [pro se petitioners] the same high standards of the legal art which we might place on members of the legal profession.” *Id.* at 961 (citing *Price v. Johnston*, 334 U.S. 266, 292 (1948)).

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<sup>14</sup> Rule 41(b) states:

If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule - except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19 - operates as an adjudication on the merits.

<sup>15</sup> In *Taylor*, the Board affirmed the administrative law judge’s dismissal of the request for a hearing because neither the claimant nor his attorney appeared at the hearing, it was unclear who had requested the hearing, and claimant’s counsel had been unable to locate the claimant for at least five months. Given the procedural history of the case, the Board held, citing Rule 41(b)’s provision authorizing dismissal for failure to prosecute, that the administrative law judge did not err in, effectively, dismissing the claim as abandoned pursuant to 29 C.F.R. §18.39(b) (amended 2015) and FRCP 41(b). *Taylor*, 22 BRBS at 411-412.

This case precedent leads us to conclude that dismissal of claimant's claim with prejudice is too extreme an action at this juncture. Claimant is not represented by legal counsel, she has not evinced an intent to abandon her claim, she misperceives the role of employer's counsel, and there remains an issue of whether claimant actually received the administrative law judge's Order to Compel and Order to Show Cause. Moreover, the dismissal order was issued only three months after the administrative law judge's Order to Compel. Given these circumstances, we cannot say that this is an "extreme situation" in which there is "clear" evidence of "willful delay" that warrants the dismissal of the claim. *McKelvey*, 789 F.2d 1518; *cf. Gratton v. Great American Communications*, 178 F.3d 1373 (11th Cir. 1999); *Lewis v. Livingston County*, 314 F.R.D. 77 (W.D.N.Y. 2016). Thus, we vacate the administrative law judge's Amended Decision and Order Dismissing Case. *See French v. California Stevedore & Ballast*, 27 BRBS 1 (1993); *Bogdis v. Marine Terminals Corp.*, 23 BRBS 136 (1989); *Twigg v. Maryland Shipbuilding & Dry Dock Co.*, 23 BRBS 118 (1989). The case is remanded in order for the administrative law judge to address whether measures less drastic than dismissal exist to advance this case to resolution or to provide for new pre-hearing procedures.<sup>16</sup>

At the time claimant filed her appeal, the administrative law judge and employer had claimant's current address. Claimant must inform the administrative law judge, the district director, and employer's counsel of any changes to her address or phone number. Moreover, claimant is advised to comply with all lawful orders of the administrative law judge and that she bears the initial burden of actually putting forth evidence to support her claim for benefits under the Act.

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<sup>16</sup> We sympathize with the administrative law judge's frustration in moving this case forward, and acknowledge his discretionary authority to structure pre-hearing procedures and to issue orders compelling the participation of the parties in the discovery process. *See* 33 U.S.C. §927(a); *Percoats v. Marine Terminals Corp.*, 15 BRBS 151 (1982); 29 C.F.R. §18.50 *et seq.* (2016). Claimant, however, remains without legal representation, and the combination of her transitory residences and her lay status has complicated the proceedings.

Accordingly, the administrative law judge's Amended Decision and Order Dismissing Claim is vacated, and the case is remanded to the administrative law judge for further proceedings.

SO ORDERED.

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JUDITH S. BOGGS  
Administrative Appeals Judge

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RYAN GILLIGAN  
Administrative Appeals Judge

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JONATHAN ROLFE  
Administrative Appeals Judge