



BRB No. 18-0203

MALLISIA M. PALMER)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: <u>July 12, 2018</u>
)	
HUNTINGTON INGALLS INDUSTRIES, INCORPORATED)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Order Not Approving Lay Representative of Dana Rosen, Administrative Law Judge, United States Department of Labor.

Lamarr Brown, Princess Anne, Maryland, lay representative, for claimant.

Benjamin M. Mason (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, ROLFE and GILLIGAN, administrative appeals judges.

PER CURIAM:

Claimant appeals the Order Not Approving Lay Representative (2017-LHC-00109, 2018-LHC-00110) of Administrative Law Judge Dana Rosen rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We will review the administrative law judge's Order for abuse of discretion and compliance with law. *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009).

Claimant has been receiving ongoing permanent partial disability benefits for injuries she suffered while working for employer in 1993. 33 U.S.C. §908(c)(21). On September 28, 2017, Lamarr Brown, a lay representative, requested a hearing on behalf of claimant, asserting that there has been a change in claimant's condition and that she is now entitled to permanent total disability benefits. *See* 33 U.S.C. §§908(a), 922. On November

9, 2017, claimant submitted a letter to the Office of Administrative Law Judges (OALJ), stating that she had chosen Mr. Brown to represent her. On November 10, 2017, Mr. Brown, submitted a letter to the administrative law judge requesting approval to serve as claimant's lay representative in the proceedings before the OALJ. Specifically, Mr. Brown stated:

This letter is to reference the entering of my initial appearance as a 'Lay Representative' in the above-mentioned case matters for [claimant]. This acknowledgment is in accordance with the Code of Federal Regulations Title 29: §18:22 (a) (2). I will through my representation show the honesty, integrity and respect of this honorable court in the representation of the 'Claimant'. I have shown through my representation of former 'Claimant's in this court as well as before Administrative Law Judges for the Social Security Administration that I have familiarized myself with the laws, procedures, and practices of this honorable court [.]

I am hoping that the elements showing my initiatives, satisfies the qualifications for me to proceed with the legal representation of [claimant] in this honorable court.

Brown Corr. (Nov. 10, 2017). The administrative law judge addressed Mr. Brown's request in an Order Not Approving Lay Representative, issued on November 29, 2017. The administrative law judge observed that, pursuant to Section 18.22(b)(2) of the Rules of Practice and Procedure for the Office of Administrative Law Judges (OALJ Rules),¹ she

¹ Section 18.22(b)(2) of the OALJ Rules states in relevant part:

Non-attorney representative. An individual who is not an attorney [] may represent a party [] upon the judge's approval. The individual must file a written request to serve as a non-attorney representative that sets forth the name of the party [] represented and certifies that the party [] desires the representation. The judge may require that the representative establish that he or she is subject to the laws of the United States and possesses communication skills, knowledge, character, thoroughness and preparation reasonably necessary to render appropriate assistance. The judge may inquire as to the qualification or ability of a non-attorney representative to render assistance at any time. The judge may deny the request to serve as non-attorney representative after providing the party or subpoenaed witness with notice and an opportunity to be heard.

may require a lay representative establish his ability to render appropriate assistance. The administrative law judge denied Mr. Brown's request to serve as claimant's lay representative, summarily finding that, "Mr. Brown has not demonstrated sufficient knowledge and qualifications to represent the Claimant under the Longshore and Harbor Workers' Compensation Act." Order at 2 (Nov. 29, 2017).

On February 1, 2018, claimant, without representation, appealed the administrative law judge's Order declining to approve Mr. Brown as her lay representative. On February 26, 2018, Mr. Brown made application to appear and represent claimant in the proceedings before the Board.² Employer responds, contending the administrative law judge properly denied Mr. Brown's request.³

Claimant's appeal is of a non-final, or interlocutory, order. The Board ordinarily does not undertake review of non-final orders. *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). The United States Supreme Court has articulated a three-pronged test to determine whether an order that does not finally resolve litigation is nonetheless appealable. First, the order must conclusively determine the disputed question. Second, the order must resolve an important issue which is completely separate from the merits of

29 C.F.R. §18.22(b)(2). The 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).

² We grant this request. 20 C.F.R. §802.202(d)(2).

³ Subsequent to the issuance of the disqualification order, the administrative law judge, by Order dated December 1, 2017, ordered claimant to provide, by January 19, 2018, a written status report regarding whether she intended to withdraw her claim or proceed to hearing. If the latter, claimant was to inform the administrative law judge whether she would represent herself or obtain another representative. The administrative law judge's order additionally directed claimant to a local attorney referral service should she "decide to retain an approved representative in this case." Order at 2 (Dec. 1, 2017). Claimant did not respond to this Order.

On January 24, 2018, the administrative law judge issued an Order to Show Cause Why Claim Should Not Be Dismissed for Abandonment and the Claim Remanded. On the same date, claimant wrote a letter to the administrative law judge, stating that she would proceed without representation and would abide by the deadlines set.

Given claimant's appeal to the Board, the administrative law judge issued an Order dated March 1, 2018, staying any further proceedings until the Board issues a decision.

the action. Third, the order must be effectively unreviewable on appeal from a final judgment. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988) (collateral order doctrine). If the order at issue fails to satisfy any one of these requirements, it is not appealable. *Id.* at 276. While the Board is not bound by the formal or technical rules of procedure governing litigation in federal courts, *see* 33 U.S.C. §923(a), it has relied on such rules for guidance where the Act and its regulations are silent. *See generally Sprague v. Director, OWCP*, 688 F.2d 862, 869 n.16, 15 BRBS 11, 21 n.16(CRT) (1st Cir. 1982). Thus, where the order appealed from does not satisfy the three-prong test, the Board ordinarily will not grant interlocutory review, unless, in its discretion, the Board finds it necessary to direct the course of the adjudicatory process. *See Pensado v. L-3 Communications Corp.*, 48 BRBS 37 (2014); *Baroumes v. Eagle Marine Services*, 23 BRBS 80 (1989).

The administrative law judge's procedural order does not satisfy the three-prong test of the collateral order doctrine. Although the order conclusively determined Mr. Brown's capacity to serve as claimant's lay representative in this case, and this issue is collateral to the merits of the claim, the order is not unreviewable at a later date as claimant may challenge the administrative law judge's procedural ruling after a decision on the merits has issued and any error may be remedied. *See Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994); *see generally Richardson Merrell, Inc. v. Koller*, 472 U.S. 424 (1985) (disqualification of attorney-representative in civil case is not appealable on an interlocutory basis); *Flanagan v. United States*, 465 U.S. 259 (1984). Nonetheless, we will entertain claimant's appeal at this time to direct the course of the adjudicatory process. *See, e.g., Pensado*, 48 BRBS 37; *Baroumes*, 23 BRBS 80. We review an administrative law judge's procedural orders for an abuse of discretion and compliance with law. *See generally Armani v. Global Linguist Solutions*, 46 BRBS 63 (2012); *Jackson v. Universal Maritime Service Corp.*, 31 BRBS 103 (1997) (Brown, J., concurring); *Tignor*, 29 BRBS 135; *Duran v. Interport Maint. Corp.*, 27 BRBS 8 (1993).

We hold that the administrative law judge's order does not comply with the Administrative Procedure Act, 5 U.S.C. §557(C)(3)(A) (the APA), which requires the administrative law judge to state her "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or *discretion* presented on the record." 5 U.S.C. §557(c)(3)(A) (emphasis added); *see generally Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996); *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990). Although the administrative law judge is afforded broad discretion in the conduct of pre-hearing matters and may deny a request to serve as a lay representative, 29 C.F.R. §§18.12, 18.22(b)(2), 18.43; *see also* 5 U.S.C. §554 *et seq.*; *Butler v. Ingalls Shipbuilding, Inc.*, 28 BRBS 114 (1994); *Durham v. Embassy Dairy*, 19 BRBS 105 (1986), she was required by the APA to set forth the reasons for finding that Mr. Brown did not establish he possesses the knowledge and qualifications necessary to represent claimant in

this case.⁴ Further, the administrative law judge's omission may be of no small significance as the Act's implementing regulations specifically permit parties to a claim to present their case with the assistance of a lay representative, 20 C.F.R. §702.131(a),⁵ and the administrative law judge's disqualification of Mr. Brown effectively compelled claimant to pursue her claim without representation.⁶

Consequently, we vacate the administrative law judge's disqualification of Mr. Brown, and remand the case for her to reconsider this issue. On remand, the administrative law judge must reconsider Mr. Brown's request to serve as claimant's lay representative. If she again finds Mr. Brown has not established that he possesses the qualifications reasonably necessary to represent claimant in proceedings under the Act, she must explain her finding in accordance with the APA.

⁴ Mr. Brown's request to serve as claimant's lay representative states the purpose of the correspondence, citing the Code of Federal Regulations, references Mr. Brown's prior experience representing claimants before the Social Security Administration, and additionally indicates that Mr. Brown familiarized himself with the rules of practice and procedure before the OALJ.

⁵ Section 702.131(a) of the Act's regulations states:

Claimants, employers and insurance carriers may be represented in any proceeding under the Act by an attorney or other person previously authorized in writing by such claimant, employer or carrier to so act.

20 C.F.R. §701.131(a).

⁶ In her appellate brief, claimant states that her prior attorney declined to pursue her claim for modification. Cl. Br. at 2. Further, the administrative law judge's "Order Staying Proceedings Pending Claimant's Benefits Review Board Interlocutory Appeal" notes that claimant responded to the Order to Show Cause, stating that Mr. Brown was not allowed to represent her and that she would proceed without representation because neither of her former counsel acknowledged a viable claim. Order at 3 (Mar. 1, 2018).

Accordingly, the administrative law judge's Order Not Approving Lay Representative is vacated, and we remand the case for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge