



MARIA JORDAN	)	BRB No. 15-0518
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DYNCORP INTERNATIONAL, L.L.C.	)	DATE ISSUED: <u>Mar. 7, 2016</u>
	)	
and	)	
	)	
CONTINENTAL CASUALTY COMPANY	)	
	)	
Employer/Carrier-	)	ORDER on MOTION
Respondents	)	for RECONSIDERATION
	)	
	)	
	)	
MARIA JORDAN	)	BRB Nos. 16-0117, 16-0139
	)	16-0190 and 16-0231
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DYNCORP INTERNATIONAL, L.L.C.	)	
	)	
and	)	
	)	
CONTINENTAL CASUALTY COMPANY	)	
	)	
Employer/Carrier-	)	
Respondents	)	ORDER

Claimant has filed a motion for reconsideration of the Board's Order dismissing her interlocutory appeals, *Jordan v. DynCorp Int'l, L.L.C.*, BRB No.15-0518 (Dec. 4, 2015). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. Employer responds, opposing the motion. Additionally, claimant has filed several other notices of appeal, to which employer has responded.<sup>1</sup> Each appeal shall be addressed in turn.

## BRB No. 15-0518

Claimant appealed the following orders: the Order Granting Claimant's Motion to Reconsider June 17, 2015 Decisions issued August 3, 2015; the Order Granting Change in Venue and Rescheduling Hearing issued June 30, 2015, and the Order on Reconsideration issued August 3, 2015; the Order Granting Employer's Motion to Compel Claimant to Participate in a Deposition issued August 5, 2015, and the Order on Reconsideration issued September 3, 2015; the Order Denying Claimant's Motion for Partial Summary Decision issued August 5, 2015; and the Order Granting Employer's Motion to Compel Claimant to Provide Full Discovery Responses issued August 20, 2015, and the Order on Reconsideration issued September 3, 2015. 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 dismissed claimant's appeals of these orders because the collateral order doctrine did not apply, and it was unnecessary for the Board to direct the course of the adjudication process.<sup>2</sup> With respect to all orders appealed in BRB No. 15-0518, except the Order changing the venue of the hearing as discussed below, we deny the motion for reconsideration and reaffirm the Board's Order dismissing claimant's interlocutory appeals. 20 C.F.R. §802.409. Claimant has not established that she has been denied due process of law. *Newton*, 38 BRBS 23. The administrative law judge has broad discretion to direct, authorize, and compel discovery. 33 U.S.C. §927(a); *Goicochea v. Wards Cove Packing Co.*, 37 BRBS 4 (2003); *Olsen v. Triple A Machine Shops, Inc.*, 25 BRBS 40 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, 996 F.2d 1226 (9th Cir. 1993); 29 C.F.R. §§18.50-18.51 (2015). Moreover, the discovery orders appealed are reviewable upon the issuance of a final decision on the merits. *Newton*, 38 BRBS 23.

With respect to the Order changing the venue of the hearing from Kansas City, Missouri, to Washington, D.C., we grant claimant's motion for reconsideration, as this collateral order is effectively unreviewable on appeal from a final judgment. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988) ("collateral order doctrine"); *Niazy v. The Capital Hilton Hotel*, 19 BRBS 266 (1987). Nevertheless, we deny the

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<sup>1</sup> We consolidate these appeals for the purpose of issuing this Order. 20 C.F.R. §802.104(a). Some Order titles have been shortened for convenience.

<sup>2</sup> We deny as moot claimant's Motion for Enlargement of Time to file her Motion for Reconsideration. Claimant's Motion for Reconsideration, post-marked January 5, 2016, was filed in a timely manner. 20 C.F.R. §§802.221(b), 802.407(a).

relief requested.

Section 702.337(a) of the Act's regulations states: "Except for good cause shown, hearings shall be held at convenient locations no more than 75 miles from the claimant's residence." 20 C.F.R. §702.337(a). Judge Merck stated that "good cause" is not defined and that it is within his discretion as the adjudicator to determine whether it has been shown, as the regulation permits him to "consider the convenience and necessity of the parties and witnesses" in making a venue determination. Order Changing Venue at 5 (June 20, 2015); 29 C.F.R. §18.40(b) (2015); *see also* 20 C.F.R. §702.340(b) ("No person shall be required to attend as a witness in any proceeding before [an administrative law judge] at a place more than 100 miles from his place of residence, unless [he is paid mileage and fees for such attendance.]"). Judge Merck recognized claimant's arguments in opposition to employer's motion and concluded that employer provided persuasive reasons for its motion to change the venue "as most potential witnesses reside in [the Washington, D.C.] area or overseas, and Claimant will travel from overseas to attend the hearing regardless of where it is held." Order Changing Venue at 5. On claimant's motion for reconsideration, Judge Merck addressed claimant's contentions, but affirmed the change of venue and set the hearing for December 1, 2015, at the Office of Administrative Law Judges in Washington, D.C.<sup>3</sup> Order (Aug. 3, 2015). On appeal, claimant contends the change of venue was not based on a finding of fact supported by substantial evidence, Cl. Notice of Appeal at 11, and that no good cause for the change was shown, Cl. M/Recon. at 7 n.7.

The granting of an order changing the venue of a hearing is to be based on a showing of "good cause." 20 C.F.R. §702.337(a). The administrative law judge has great discretion in determining whether "good cause" has been shown, and we review his decision to change the venue under the abuse of discretion standard, not the substantial evidence standard. *See* 5 U.S.C. §556(c); *McCracken v. Spearin, Preston & Burrows, Inc.*, 36 BRBS 136 (2002); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); *Duran v. Interport Maint. Corp.*, 27 BRBS 8 (1993); *McCurley v. Kiewest Co.*, 22 BRBS 115 (1989); 20 C.F.R. §§702.338-702.341; 29 C.F.R. §§18.50-18.51 (2015). As discussed above, Judge Merck found that employer showed good cause for a change of venue. In her appeal of the venue order and her Motion for Reconsideration of the Board's Order dismissing this appeal, claimant has not raised any challenges which establish that Judge Merck abused his discretion in granting employer's motion on the arguments presented to

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<sup>3</sup> The hearing has since been postponed until May 3-5, 2016. *See* Judge Merck's Order dated January 27, 2016. The administrative law indicated that he would work with the parties to set a date that was convenient for all, given the change of venue orders.

him.<sup>4</sup> See generally *Nardella v. Campbell Machine, Inc.*, 525 F.2d 46, 3 BRBS 78 (9th Cir. 1975); 20 C.F.R. §§702.338-702.341; 29 C.F.R. §§18.50-18.51 (2015). That Judge Merck could have denied employer's motion based on claimant's opposition to it does not establish that he abused his discretion. See, e.g., *Nardella*, 525 F.2d 46, 3 BRBS 78. Accordingly, although we grant claimant's motion to reconsider the summary dismissal of the appeal of the change of venue order, we deny the relief requested.<sup>5</sup> 20 C.F.R. §802.409. Therefore, we reaffirm the Board's dismissal of claimant's appeal in BRB No. 15-0518 in its entirety.<sup>6</sup>

## **BRB No. 16-117**

The Board acknowledges claimant's appeal of three orders issued by Judge Merck: the Order Denying Claimant's Motion for Partial Summary Decision issued August 5, 2015; the Order Denying Claimant's Renewed Motion for Partial Summary Decision issued November 9, 2015; and the Order Denying Claimant's Motion for Sanctions issued November 10, 2015. 33 U.S.C. §921(b); 20 C.F.R. §§802.205, 802.207, 802.210. Claimant's appeal is assigned the Board's docket number 16-0117. The administrative law judge's orders are interlocutory, and claimant's appeal does not raise any basis for the Board to engage in interlocutory review of the administrative law judge's orders. *Gulfstream Aerospace*, 485 U.S. 271; *Newton*, 38 BRBS 23; *Green v. Ingalls Shipbuilding, Inc.*, 29 BRBS 81 (1995). Indeed, the denial of a motion for partial

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<sup>4</sup> In her appeal to the Board, claimant alleges that Judge Merck's action was not adequately supported by the evidence, but does not assert that she will sustain any harm or undue hardship. Consequently, we consider only whether it was within the scope of Judge Merck's authority to take this action based on the evidence before him.

<sup>5</sup> Given the panel's disposition of claimant's motion for reconsideration, we deny claimant's request for en banc review. 20 C.F.R. §§801.301(c), 802.407(d).

<sup>6</sup> Claimant also moves that the Board issue subpoenas related to her claims because the administrative law judge declined to do so. Claimant's reliance on the language of Section 27(a), 33 U.S.C. §927(a), to support her motion that the Board issue subpoenas is misplaced. Notwithstanding the language of Section 27(a), the administrative law judge, not the Board or the district director, has the discretion and the authority to issue subpoenas. See 33 U.S.C. §919(d); *J.R. [Robinson] v. NGSS/Ingalls Operations*, 43 BRBS 86 (2009) (the Board does not hold informal conferences or issue recommendations despite language of Section 28(b) of the Act); *Maine v. Brady-Hamilton Stevedore Co.*, 18 BRBS 129 (1986) (only administrative law judge has authority to issue subpoenas); 20 C.F.R. §702.341; 29 C.F.R. §§18.12, 18.56 (2015). Therefore, we deny claimant's request that the Board issue subpoenas.

summary decision is not a final order and is not appealable on an interlocutory basis because the order has not “resolved” any issues. *Suydam v. Reed Stenhouse of Washington, Inc.*, 820 F.2d 1506 (9th Cir. 1987); *Oppenheimer v. Los Angeles County Flood Control Dist.*, 453 F.2d 895 (9th Cir. 1972); *Green*, 29 BRBS 81. Therefore, we dismiss claimant’s appeal of these orders.

#### **BRB No. 16-139**

Claimant appeals two orders issued by Judge Romero: the Order Denying Request for Subpoena issued October 30, 2015; and the Order Denying Motion for Reconsideration and Request to Vacate Orders issued November 27, 2015. 33 U.S.C. §921; 20 C.F.R. §§802.205, 802.207. This appeal was previously acknowledged. 20 C.F.R. §802.210. Judge Romero’s orders are interlocutory, and claimant’s appeal does not raise any basis for the Board to engage in interlocutory review. *Gulfstream Aerospace*, 485 U.S. 271; *Newton*, 38 BRBS 23. Therefore, we dismiss claimant’s appeal of these orders.<sup>7</sup>

#### **BRB No. 16-190**

The Board acknowledges claimant’s appeal of Judge Romero’s Order Denying Motion for Sanctions issued December 14, 2015, and three orders issued by Judge Merck on December 17, 2015: the Order Joining Additional Issue and Scheduling Conference Call; the Order Denying Claimant’s Motion for Extension of Time to File a Second Objection and Denying Claimant’s Request to Amend the Complaint; and the Order Granting in Part and Denying in Part Claimant’s Motion to Compel and Order Denying Claimant’s Motion to Stay Proceedings. 33 U.S.C. §921(b); 20 C.F.R. §§802.205, 802.207, 802.210. Claimant’s appeal is assigned the Board’s docket number 16-0190. These orders are interlocutory, and claimant’s appeal does not raise any basis for the Board to engage in interlocutory review. *Gulfstream Aerospace*, 485 U.S. 271; *Newton*, 38 BRBS 23. We note, however, that Judge Merck has the discretion to consolidate claimant’s discrimination and disability claims into a single proceeding on the basis that the claims arise from the same facts and in the interest of judicial efficiency. 29 C.F.R. §18.43(a) (2015). Therefore, we dismiss claimant’s appeal of these orders.<sup>8</sup>

#### **BRB No. 16-231**

The Board acknowledges claimant’s appeal of Judge Merck’s Order Denying

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<sup>7</sup> We deny as moot claimant’s Motion for Expedited Review.

<sup>8</sup> We deny as moot claimant’s Motion for Expedited Review.

Claimant's Motion Requesting that this Court "Publish" an Alleged Ex Parte Communication and Order Warning Counsel of the Potential Consequences of Filing Frivolous Motions and Order Denying Claimant's Request for Subpoenas at this Time issued January 27, 2016. 33 U.S.C. §921(b); 20 C.F.R. §§802.205, 802.207, 802.210. Claimant's appeal is assigned the Board's docket number 16-0231. This order is interlocutory, and claimant's appeal does not raise any basis for the Board to engage in interlocutory review. *Gulfstream Aerospace*, 485 U.S. 271; *Newton*, 38 BRBS 23. Therefore, we dismiss this appeal.<sup>9</sup>

Accordingly, claimant's motion for reconsideration and the relief requested in BRB No. 15-0518 are denied, and the Board's dismissal order is affirmed. The appeals of the interlocutory orders in BRB Nos. 16-0117, 16-0139, 16-0190, and 16-0231 are dismissed. Claimant is advised that all future interlocutory appeals will be summarily dismissed unless they clearly meet the criteria for interlocutory review. Claimant also is advised that she bears the initial burden of actually putting forth evidence to support her disability and Section 49, 33 U.S.C. §948(a), discrimination claims. 33 U.S.C. §920(a); *Babick v. Todd Pacific Shipyards Corp.*, 49 BRBS 11 (2015); *Gacki v. Sea-Land Service, Inc.*, 33 BRBS 127 (1998); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1980). Further, the administrative law judge has the authority and discretion to structure the pre-hearing procedures and to issue orders compelling participation in the discovery process. 33 U.S.C. §927(a); *Percoats v. Marine Terminals Corp.*, 15 BRBS 151 (1982); 29 C.F.R. §18.50 *et seq.* (2015). Continued noncompliance with lawful orders of Judge Merck, or any administrative law judge, such as those wherein claimant was ordered to submit evidence and to appear at a deposition, or the filing of frivolous motions, serves only to delay claimant's case and potentially subjects claimant's counsel to sanctions. 33 U.S.C. §927(b); *A-Z Int'l v. Phillips*, 179 F.3d 1187, 33 BRBS 59(CRT) (9th Cir. 1999); *Goicochea*, 37 BRBS 4; 29 C.F.R. §18.50 *et seq.* (2015).

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<sup>9</sup> We deny as moot claimant's Motion for Expedited Review.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge

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RYAN GILLIGAN  
Administrative Appeals Judge