BRB No. 91-241

FRANCIS KANDRAVI	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HOLT CARGO SYSTEMS	)	DATE ISSUED:_____
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Francis Kandravi, Philadelphia Pennsylvania, *pro se*.

Clayton H. Thomas, Jr., Philadelphia, Pennsylvania, for employer.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order (87-LHC-1247) of Administrative Law Judge Robert D. Kaplan dismissing 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 must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with applicable law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant was injured on April 1, 1985 when he was struck in the right calf by a forklift, and his leg was pinned between the fork and the cargo. In June 1985, Dr. Cautelli discovered that claimant had fractured his fibula as a result of this accident. Tr. at 60-61, 66-67. Claimant notified employer of the injury immediately. On July 25, 1985, Dr. Auday opined that claimant had recovered from the injury of April 1, but that he should be examined by a vascular surgeon to determine why his leg condition had not improved. Emp. Ex. D. Hospital records reviewed by Dr. Weiner prior to her report dated January 13, 1986, indicated that claimant suffered an occlusion of the right iliac artery. He was hospitalized in both September and October 1985, and underwent an operation for his vascular disease. According to Dr. Weiner, the vascular disease was not caused by claimant's April 1, 1985 injury, but rather was a pre-existing condition, secondary to risk factors

such as claimant's history of smoking and borderline hypertension.[1] Emp. Ex. E. Based on the lack of medical evidence to support claimant's claim that his vascular disease was caused by the work injury, employer discontinued compensation payments. Emp. Ex. B. Claimant sought additional benefits.[2]

[1]Dr. Naide, who reviewed claimant's medical records in 1988, concurred with this conclusion. Emp. Ex. G.

[2]Employer paid $14,907.24 in temporary total disability benefits from April 2, 1985 through January 27, 1986. Emp. Ex. B. Claimant claims entitlement to temporary total disability benefits from the date employer suspended payments through the date claimant returned to work, March 2, 1986. He also seeks temporary total disability benefits from March 8, 1988 through September 26, 1988, and medical benefits from January 18, 1986. Tr. at 10-11. No claim for permanent disability has been made.

Originally, the formal hearing for this case was scheduled for September 14, 1987. After five continuances, the hearing was held before Judge Murrett on May 1, 1989.[3] Claimant testified at the hearing; however, he offered no documentary or medical evidence into the record. Tr. at 12-13. Employer submitted documentary evidence into the record and cross-examined claimant at the hearing. Because claimant was to depose his doctor on June 1, 1989, the administrative law judge kept the record open until August 1, 1989. Tr. at 99. The deposition was cancelled and rescheduled for August 8, 1989. That deposition also was cancelled and the doctor has not been deposed. *See* letter dated June 5, 1989. On November 28, 1989, employer requested a new date be set to close the record, and the administrative law judge obliged, setting January 20, 1990 as the deadline.

On January 23, 1990, claimant's counsel informed the administrative law judge that claimant wished to pursue the claim, against counsel's advice. Subsequently, claimant's counsel withdrew from the case with the administrative law judge's permission. Claimant was given 30 days in which to hire a new attorney, but as of May 16, 1990, he had not done so, nor had he submitted any medical evidence. In response to the administrative law judge's Show Cause Order claimant explained he was having difficulty hiring an attorney. *See* letter dated June 4, 1990.

On June 7, 1990, the case was assigned to Judge Kaplan due to the death of Judge Murrett, and Judge Kaplan ordered the record to remain open until August 6, 1990 for claimant to submit medical evidence in support of his claim. Despite claimant's letter dated July 28, 1990, notifying the administrative law judge of Dr. Cautelli's intent to send claimant's medical records, as of September 18, 1990, Judge Kaplan had not yet received them. Consequently, he dismissed claimant's claim. Claimant appeals the dismissal, *pro se*, and employer responds, urging affirmance.

Claimant contends the administrative law judge erred in dismissing his claim. We agree and conclude that the administrative law judge acted unreasonably in taking this action under the circumstances of this case. Although an administrative law judge has the authority to dismiss a claim if warranted by the specific circumstances of the case, *Twigg v. Maryland Shipbuilding & Dry Dock Co.*, 23 BRBS 118, 121 (1989), dismissal is generally limited to situations of abandonment or other contumacious conduct. *Harrison v. Barrett Smith, Inc.*, 24 BRBS 257 (1991); *Taylor v. B. Frank Joy Co.*, 22 BRBS 408, 411 (1989). As dismissal of a claim is a drastic sanction, an administrative law judge should always consider whether less drastic methods would be more appropriate. *See generally Davis v. Williams*, 588 F.2d 69 (4th Cir. 1978); *Twigg*, 23 BRBS at 121.

The present case has undergone long procedural delays; however, a hearing was held and evidence was admitted into the record. Regardless of claimant's failure to submit medical evidence supporting his claim, the administrative law judge had testimony and documentary evidence before him on which he could base a decision on the merits. *See generally Duran v. Interport Maintenance Corp.*, 27 BRBS 8 (1993). Thus, there was no need to resort to dismissal in this instance. As

[3]Claimant made two of the requests for a continuance, and employer made three. Judge Kaplan provided a detailed and accurate discussion of the procedural events of this case. Decision and Order at 1-2.

claimant neither abandoned his claim nor engaged in contumacious conduct, the administrative law judge's dismissal of the claim constitutes an abuse of discretion. Therefore, we vacate the administrative law judge's dismissal and we remand the case for consideration of the claim on the merits based on the evidence of record.[4] *See generally Bogdis v. Marine Terminals Corp.*, 23 BRBS 136 (1989).

[4]Initially, the administrative law judge must determine whether claimant's testimony establishes a *prima facie* case sufficient to invoke the Section 20(a) presumption linking his leg condition to the work accident of April 1, 1985. *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); 33 U.S.C. §920(a). Claimant's testimony, if credible, may establish his *prima facie* case. *See generally Duran v. Interport Maintenance Corp.*, 27 BRBS 8 (1993).

Accordingly, the Decision and Order of the administrative law judge dismissing the claim is vacated, and the case is remanded for a determination on the merits.

SO ORDERED.

_____
NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
JAMES F. BROWN
Administrative Appeals Judge