

BRB No. 02-0746

PASQUALE PONTORIERO)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
UNIVERSAL MARITIME SERVICE)	DATE ISSUED: <u>JUN 30, 2003</u>
CORPORATION)	
)	
and)	
)	
SIGNAL MUTUAL INDEMNITY)	
ASSOCIATION)	
)	
Employer/Carrier-)	
Respondent)	DECISION and ORDER

Appeal of the Order of Dismissal and Order Denying Claimant's Motion for Reconsideration of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Phillip J. Rooney (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

Christopher J. Field (Field Womack & Kawczynski, LLC), South Amboy, New Jersey, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Order of Dismissal and Order Denying Claimant's Motion for Reconsideration (01-LHC-1125) of Administrative Law Judge Paul H. Teitler 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 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 law. 33 U.S.C. §921(b)(3); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant injured his left knee and back on October 12, 1993, during the course of his employment as a checker. After receiving compensation and medical benefits under the Act, claimant returned to work for employer in May 1996; however, on May 10, 1996, claimant slipped and fell at work re-injuring his left knee and back. In a Decision and Order issued on March 6, 1999, the administrative law judge found that claimant is not entitled to additional compensation for his initial October 1993 injury. For his injury of May 10, 1996, the administrative law judge awarded claimant compensation for temporary total disability, 33 U.S.C. §908(b), from May 10, 1996, to March 27, 1997, when he found claimant capable of returning to work as a checker. Claimant also was awarded compensation for a 10 percent impairment of the left knee. 33 U.S.C. §908(c)(2). Claimant appealed and employer cross-appealed the administrative law judge’s decision to the Board, which affirmed in all respects. *Pontoriero v. Universal Maritime Service Corp.*, BRB Nos. 99-0769/A (April 6, 2000) (unpub.).

On January 17, 2001, claimant filed for modification of the administrative law judge’s decision, 33 U.S.C. §922, alleging a mistake in fact in the earlier decision and a change in condition, and a hearing was scheduled for June 25, 2001. On March 7, 2001, employer propounded interrogatories to claimant. By letter dated May 22, 2001, employer asserted that claimant had failed to answer its interrogatories, and it requested that the administrative law judge order claimant’s cooperation. On June 6, 2001, claimant responded that he is proceeding with responses to employer’s interrogatories, and he requested a continuance. The administrative law judge issued an Order that day compelling claimant to answer employer’s interrogatories by June 12, 2001, or the claim may be dismissed by reason of abandonment. On July 5, 2001, the case was rescheduled for a hearing on November 14, 2001. On August 9, 2001, employer requested that claimant produce MRI films of claimant’s lumbar spine and left knee, and the reports and MRI films of claimant’s cervical spine and both shoulders. Employer also requested the medical notes of claimant’s treating physician, Dr. Charko, claimant’s income tax returns from 1997 through 2000, and a copy of claimant’s pension/retirement application. On October 25, 2001, employer moved for a second order compelling claimant to respond to its document request and a second continuance due to claimant’s failure to comply with discovery. On October 31, 2001, the administrative law judge issued an Order for claimant to show cause within 15 days why the claim should not be dismissed due to his failure to respond to employer’s March 7 and August 9, 2001, discovery requests. Claimant responded that answers to employer’s interrogatories had been forwarded to employer as well as all medical documents in claimant’s possession, but that he had been unable to obtain from the physicians all the MRI films requested by employer. On November 29, 2001, the administrative law judge scheduled the case for a calendar call on January 8, 2002.

The formal hearing was convened on January 8, 2002. At that time, employer moved that the administrative law judge order claimant's compliance with its requests for MRI film of claimant's left knee taken in February 2001 and of claimant's right shoulder taken in April 2000, a copy of Dr. Charko's complete medical records, claimant's tax returns for 1997 through 2000, and claimant's pension/retirement application. Tr. at 6-7. The administrative law judge ordered claimant to comply with these requests within 30 days by submitting the documents to employer or by sending employer medical releases so it could obtain the medical records. Tr. at 13-14, 17-18, 21-22, 25. On February 11, 2002, employer informed the administrative law judge that claimant had not provided any documents, and it moved that the administrative law judge, *inter alia*, dismiss claimant's petition for modification. On February 13, 2002, claimant responded that he had forwarded the medical releases, and that the tax information was forthcoming.

On June 24, 2002, the administrative law judge issued his Order of Dismissal, stating that claimant had not complied with his June 12, 2001, Order Compelling Discovery. Claimant moved for reconsideration, to which he attached a copy of his tax return for 2001, and he stated his willingness to fulfill employer's discovery requests. In his Order denying reconsideration, the administrative law judge stated that claimant had over a year to meet the terms of his June 12, 2001, order, and that only now was claimant responding to the order and to employer's discovery requests. The administrative law judge stated that he gave claimant every opportunity to fulfill employer's discovery requests, but that claimant's counsel failed to demonstrate that claimant intended to pursue his claim. Pursuant to this finding, and citing Section 18.39(b) of the Rules of Practice and Procedure before the Office of Administrative Law Judges, 29 C.F.R. §18.39(b), and Rule 41(b) of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 41(b), which provide for the dismissal of abandoned claims, the administrative law judge determined that he is within his authority to dismiss claimant's claim with prejudice.

Claimant appeals, contending that the administrative law judge erred in dismissing his claim. Employer responds, urging affirmance.

We initially address the administrative law judge's Order of Dismissal, wherein the administrative law judge found that claimant failed to comply with his June 12, 2001, Order that claimant answer employer's interrogatories. The administrative law judge reasoned that claimant's counsel had failed to provide employer with tax records, medical records, diagnostic imaging studies, and medical authorizations. As an initial matter, we note that claimant, in fact, did comply with the June 12, 2001, Order that he answer employer's interrogatories. The administrative law judge's rationale for dismissing the claim actually applies to claimant's non-compliance with employer's subsequent discovery requests, as stated in the October 2001 Order to show cause and the administrative law judge's order, at the January 8, 2002, hearing that claimant fully comply with employer's August 9, 2001, discovery

request, or provide employer with medical authorizations so that it could obtain the requested medical records and studies. Tr. at 6-11, 13-14, 16-18, 22.

The Board recently addressed the authority of an administrative law judge to dismiss a claim with prejudice for failure to comply with discovery orders. In *Goicochea v. Wards Cove Packing Co.*, 37 BRBS 4 (2003), the administrative law judge, citing Rules 41(b) and 37(b)(2)(C) of the Federal Rules of Civil Procedure, entered an order dismissing the claim based on claimant's failure to comply with multiple orders that claimant sign a release allowing employer to obtain claimant's entire file from the Immigration and Naturalization Service, and on what he deemed to be claimant's complete recalcitrance with respect to the discovery process, claimant's disregard of warnings about potential sanctions, and claimant's failure to respond to employer's motion to dismiss. The Board reversed the dismissal of the claim and held that the case must be remanded to the administrative law judge for consideration under Section 27(b) of the Act, 33 U.S.C. §927(b). Specifically, since the conduct cited by the administrative law judge involved the claimant's failure to obey a lawful order, the Board held that claimant's refusal to provide the requested release to employer falls within the scope of Section 27(b) of the Act.¹ As the Act

¹Section 27(b) of the Act, provides:

If any person in proceedings before a deputy commissioner or Board *disobeys or resists any lawful order or process, . . . or neglects to produce, after having been ordered to do so, any pertinent book, paper or document, . . .* the deputy commissioner or Board *shall certify* the facts to the district court having jurisdiction in the place in which he is sitting (or to the United States District Court for the District of Columbia if he is sitting in such District) which shall thereupon in a summary manner hear the evidence as to the acts complained of, and, if the evidence so warrants, punish the person in the same manner and to the same extent as for a contempt committed before the court, or commit such person upon the same conditions as if doing of the forbidden act had occurred with reference to the process of or in the presence of the court.

33 U.S.C. §927(b) (emphasis added). In 1972, the Act was amended to add Section 19(d), which provides for the transfer of adjudicative functions to the Office of Administrative Law Judges. 33 U.S.C. §919(d). Thus, since 1972, administrative law judges, rather than deputy commissioners (now referred to as district directors), conduct formal hearings, and hold the powers and duties granted deputy commissioners under Section 27 of the Act. See *Percoats v. Marine Terminals Corp.*, 15 BRBS 151, 153-154 (1982).

contains a specific provision governing the manner in which to sanction the failure to comply with a lawful discovery order,² the Board held in *Goicochea* that neither the general Rules of Practice and Procedure for the Office of Administrative Law Judges, 29 C.F.R. Part 18, nor the Federal Rules of Civil Procedure apply to permit the administrative law judge to dismiss the claim with prejudice. *Goicochea*, 37 BRBS at 6; see *Metropolitan Stevedore Co. v. Brickner*, 11 F.3d 887, 27 BRBS 132(CRT) (9th Cir. 1993); 29 U.S.C. §18.1(a); see also 33 U.S.C. §923(a).

²Under Section 27(b) the district court may punish as contempt of court any disobedience or resistance to a lawful order or process issued in the course of administrative proceedings under the Act. See *A-Z Int'l v. Phillips*, 179 F.3d 1187, 33 BRBS 59(CRT) (9th Cir. 1999), citing *Stevedoring Services of America v. Eggert*, 953 F.2d 552, 25 BRBS 92(CRT) (9th Cir. 1992), cert. denied, 505 U.S. 1230 (1992).

Pursuant to *Goicochea*, we therefore hold in the instant case that the administrative law judge erred in dismissing claimant's claim based upon claimant's failure to respond to the administrative law judge's orders that he comply with employer's discovery requests, and in not considering the applicability of Section 27(b) to the facts before him. As claimant's failure to provide employer with his tax returns for 1997 through 2000, his pension/retirement application, MRI film of claimant's left knee taken in February 2001, MRI film of claimant's right shoulder taken in April 2000, and a complete copy of Dr. Charko's medical records, or, alternatively, to execute and deliver an authorization releasing his medical records to employer, was in direct noncompliance with the administrative law judge's lawful order,³ it constitutes conduct which may be addressed under the procedural mechanism of Section 27(b). Rather than dismissing claimant's claim for this reason, the administrative law judge must follow the procedures provided for in Section 27(b) of the Act. Accordingly, we vacate the administrative law judge's dismissal of claimant's claim based upon claimant's failure to comply with the administrative law judge's discovery orders, and we remand the case to the administrative law judge to consider whether the certification of the facts to the district court pursuant to Section 27(b) of the Act is appropriate in this case.

We next address the administrative law judge's Order Denying Reconsideration, in which he additionally dismissed claimant's claim based on claimant's abandonment of, or failure to prosecute, his claim. The administrative law judge's authority to dismiss a claim with prejudice for these reasons, pursuant to 29 C.F.R. §18.39(b),⁴ stems from 29 C.F.R. §18.29(a), which affords the administrative law judge all necessary powers to conduct fair and impartial hearings and to take any appropriate action authorized by the Federal Rules of Civil Procedure. Rule 41(b), Fed. R. Civ. P. 41(b), provides for the involuntary dismissal of a claim for, *inter alia*, failure to comply with an order of the court or to prosecute the claim. The courts have interpreted this rule as permitting a case's dismissal only where there is a clear record of delay or contumacious conduct, or when less drastic sanctions have proved unsuccessful. *Penny Theatre Corp. v. Plitt Theatres, Inc.*, 812 F.2d 337 (7th Cir. 1987); *Donnelly v. Johns Manville Sales Corp.*, 677 F.2d 339 (3^d Cir. 1982); *Twigg v. Maryland Shipbuilding & Dry Dock Co.*, 23 BRBS 118 (1989). In *Twigg*, citing *Davis v. Williams*, 588 F.2d 69 (4th Cir. 1978), the Board listed several factors to be considered by the administrative law judge in considering whether to dismiss a claim. These factors included: 1) the degree of personal responsibility on the part of

³Claimant does not challenge the "lawfulness" of the administrative law judge's orders that he comply with employer's discovery requests.

⁴Section 18.39(b), states, in part, that "A request for hearing may be dismissed upon its abandonment or settlement by the party or parties who filed it." 29 C.F.R. §18.39(b).

plaintiff; 2) the amount of prejudice to defendant caused by the delay; 3) the presence/absence of drawn out history of deliberately proceeding in a dilatory fashion; and 4) the effectiveness of sanctions less drastic than dismissal. *Twigg*, 23 BRBS at 121. The United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, had found the *Davis* factors relevant, although not necessarily all-encompassing, to the determination of the appropriateness of a dismissal pursuant to Rule 41(b). *Donnelly*, 677 F.2d at 342-343; see also *Madesky v. Campbell*, 705 F.2d 703 (3^d Cir. 1983).

In this case, the administrative law judge on reconsideration stated that claimant's counsel did not further his client's claim for modification in an expeditious manner by failing to respond to the administrative law judge's June 12, 2001, Order and to employer's discovery requests. He noted employer's letter of February 11, 2002, stating that none of the requested medical releases or tax or medical records had been received, and that counsel's attempt to comply on reconsideration by filing claimant's 2001 tax return was lacking and overdue.⁵ He therefore found that claimant did not intend to pursue his claim, and the administrative law judge declined to overturn his prior Order of Dismissal.

We vacate the administrative law judge's finding that claimant's claim should be dismissed for failure to prosecute, pursuant to 29 C.F.R. §18.39(b) and Rule 41(b). As we have held, claimant's counsel's dilatory response to the administrative law judge's discovery orders cannot be sanctioned by dismissing the claim. 33 U.S.C. §927(b); *Goicochea*, 37 BRBS at 7-8. Moreover, the administrative law judge's dismissal of the claim for failure to prosecute cannot be affirmed, as the administrative law judge did not address relevant factors before imposing such a drastic sanction. The administrative law judge did not address to what extent claimant was personally responsible for the delay in forwarding to employer the requested materials. There is no evidence that employer has been prejudiced by the delay engendered by claimant's failure to timely comply with employer's discovery requests. Pursuant to the administrative law judge's initial decision, employer has not paid claimant benefits for his work injuries since the administrative law judge found claimant entitled to compensation for a 10 percent impairment of his right leg. Thus, there is no evidence that employer has been prejudiced by delay in the prosecution of claimant's Section 22 claim. Finally, the administrative law judge did not consider the applicability of any lesser sanctions for claimant's failure to fully comply with employer's discovery requests and the administrative law judge's orders. Therefore, the administrative law judge's dismissal of the claim on reconsideration based on failure to prosecute is vacated, and the case is remanded to the administrative law judge for further consideration of factors relevant to the determination of whether claimant's claim should be dismissed for lack of prosecution. See *French v. California Stevedore & Ballast*, 27 BRBS 1 (1993);

⁵In addition, claimant supplied the medical releases on February 13, 2002.

Bogdis v. Marine Terminals Corp., 23 BRBS 136 (1989); *Twigg*, 23 BRBS 118.

Accordingly, the administrative law judge's Order of Dismissal and Order Denying Claimant's Motion for Reconsideration are vacated, and the case is remanded for further proceedings in accordance with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge