

BRB No. 07-0250 BLA

H. D.)
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 Claimant-Petitioner)
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 v.)
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 ISLAND FORK CONSTRUCTION, LTD.)
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 and)
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 FRONTIER INSURANCE COMPANY) DATE ISSUED: 09/26/2007
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 and)
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 DRY FORK ENERGY, INCORPORATED)
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 and)
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 REALM NATIONAL INSURANCE)
 COMPANY)
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 and)
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 D K MINING, INCORPORATED)
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 Employers/Carriers-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Order of Dismissal by Reason of Abandonment of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

H. D., Phelps, Kentucky, *pro se*.

Norman E. Harned and W. Greg Harvey (Harned, Bachert & Denton, LLP), Bowling Green, Kentucky, for employer Dry Fork Energy, Incorporated.

Michelle S. Gerdano (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Order of Dismissal by Reason of Abandonment (2006-BLA-5300) of Administrative Law Judge Larry S. Merck on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge determined that on May 4, 2004, the district director had issued a Proposed Decision and Order- Abandonment of Claim after claimant did not attend scheduled depositions on two separate occasions and then failed to attend a third deposition that he had scheduled in response to the district director's order to show cause, issued on March 11, 2004, as to why the claim should not be dismissed by reason of abandonment. Following claimant's timely request for a hearing pursuant to 20 C.F.R. §725.409(c), this case was assigned to the administrative law judge, who issued an order to show cause on October 4, 2006. Noting that the record did not reflect any unusual circumstances preventing claimant from complying with the written request to appear for deposition, and that abandonment occurs pursuant to 20 C.F.R. §725.409 when the claimant fails to pursue the claim with reasonable diligence, fails to submit evidence sufficient to make a determination of the claim, refuses to undergo a required medical examination without good cause, or fails to attend the informal conference without good cause, the administrative law judge directed claimant to respond in writing, within ten days of the date of the order, as to why his claim should not be dismissed by reason of abandonment. Claimant responded by letter received on October 18, 2006, that "I didn't make it there at the hearing [sic] because, the ride that was to pick me up, didn't show up." The administrative law judge concluded that claimant had failed to show just cause why his claim should not be dismissed by reason of abandonment, and found that dismissal for cause pursuant to 20 C.F.R. §725.465 was appropriate.

On appeal, claimant generally challenges the administrative law judge's dismissal of his claim. Employer Dry Fork Energy, Incorporated (Dry Fork) responds, urging affirmance of the order of dismissal. The Director, Office of Workers' Compensation

Programs (the Director), has filed a motion to remand, urging the Board to vacate the administrative law judge's order and remand the case for a hearing.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The Director contends that the administrative law judge erred in failing to hold the hearing requested by claimant under Section 725.409(c), and in dismissing the claim for cause pursuant to Section 725.465. We agree. The Act and regulations mandate that an administrative law judge hold a hearing on any claim whenever a party requests such a hearing, *see* 20 C.F.R. §§725.421(a), 725.450, 725.451, unless one of the following exceptions is applicable: (1) such hearing is waived by the parties, *see* 20 C.F.R. §725.461(a); (2) a party requests summary judgment and the administrative law judge determines that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law, *see* 20 C.F.R. §725.452(c); or (3) the administrative law judge notifies the parties by written order of his belief that a hearing is not necessary, allowing at least 30 days for the parties to respond, and no party requests that a hearing be held, *see* 20 C.F.R. §725.452(d). *See Robbins v. Cyprus Cumberland Coal Co.*, 146 F.3d 425, 21 BLR 2-495 (6th Cir. 1998); *Pukas v. Schuylkill Contracting Co.*, 22 BLR 1-69 (2000). Under the facts of the present case, none of the exceptions was applicable. Further, the administrative law judge's dismissal of the claim for cause pursuant to Section 725.465 was not appropriate, as there had been no prior final adjudication of the claim and claimant did not fail to attend a hearing or fail to comply with a lawful order of the administrative law judge. *See* 20 C.F.R. §725.465(a). Pursuant to claimant's request under Section 725.409(c), the administrative law judge was required to hold a hearing to determine whether the sanction applied by the district director pursuant to subsections (a) and (b) was proper, *i.e.*, denial of the claim by reason of abandonment, and nothing in Section 725.465 allows an administrative law judge to impose an additional requirement on the claimant in order to receive the hearing. 20 C.F.R. §§725.409, 725.465. Consequently, we vacate the administrative law judge's Order of Dismissal by Reason of Abandonment, and remand the case to the administrative law judge to conduct a hearing as requested by claimant pursuant to Section 725.409(c), limited to the issue of whether the district director properly denied the claim by reason of abandonment.

Accordingly, the administrative law judge's Order of Dismissal by Reason of Abandonment is vacated and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge