U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, NW
Washington, DC 20210

In the Matter of:

THOMAS SAPORITO,

COMPLAINANT,

v.

GE MEDICAL SYSTEMS ADECCO TECHNICAL,

RESPONDENTS.

ARB CASE NO. 04-007

ALJ CASE NOS. 2003-CAA-1
2003-CAA-2

DATE: November 25, 2003

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Thomas Saporito, pro se, ***Jupiter, Florida***

For the Respondents:
Dudley Rochelle, Esq., ***Littler – Mendelson, Atlanta, Georgia***

FINAL ORDER DENYING REQUEST FOR INTERLOCUTORY REVIEW

This case arises under the employee protection provisions of the Clean Air Act, 42 U.S.C.A. § 7622 (West 1995).

BACKGROUND

On May 14, 2003, the Complainant, Thomas Saporito filed a motion with a Department of Labor Administrative Law Judge (ALJ) requesting that the post-hearing briefing schedule in this case be vacated and that he be given an opportunity to present rebuttal to the testimony that was taken at the hearing in this matter. In response, the ALJ ordered Saporito to supplement his motion with more specific information as to the rebuttal testimony that he wanted to offer. In particular, the ALJ required that Saporito specify the rebuttal testimony to be offered by each proposed rebuttal witness and to certify that he had spoken to his proposed rebuttal witnesses to verify the substance of their testimony.

In an order dated September 19, 2003, the ALJ denied Saporito's request. Order Denying Motion to Offer Rebuttal Testimony and Setting Post-Trial Briefing Schedule (Ord.) at 2. The ALJ found that Saporito had failed to submit the supplemental information required in support of the testimony of several witnesses and the information provided for one witness was insufficient to demonstrate that the witness would be a proper rebuttal witness.

The ALJ also rejected Saporito's allegation that he had not been permitted to call rebuttal witnesses at the hearing as inconsistent with the record. The ALJ noted that at the conclusion of the hearing the ALJ specifically asked the parties whether there was "'anything further'" that needed to be addressed, and Saporito responded, "'No.'" Ord. at 2. Finally, the ALJ denied Saporito's request to certify the issue for interlocutory appeal to the Board.

On October 14, 2003, Saporito filed "Claimant's Request for Briefing Schedule to Submit Interlocutory Appeal of ALJ's Order (C. R.). Respondent Adecco Technical has filed an opposition to the request on the grounds that the ALJ has not certified the case for interlocutory review.

ISSUE PRESENTED

Whether the Board should dismiss Saporitio's petition for review as an impermissible interlocutory appeal.

DISCUSSION

In *Plumley v. Federal Bureau of Prisons*, 86-CAA-6 (Sec'y April 29, 1987), the Secretary of Labor described the procedure for obtaining review of an ALJ's interlocutory order. Slip op. at 2. The Secretary acknowledged that the procedures for litigation and administrative review of whistleblower complaints under the environmental statutes at issue here[1] do not provide for interlocutory review of an ALJ's rulings on motions in the course of administrative hearings. *Id.* In cases presenting situations for which the regulations do not provide, the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges, 29 C.F.R. Part 18 and the Federal Rules of Civil Procedure apply. *Id.* Turning to 29 C.F.R. Part 18 for guidance, the Secretary noted that 29 C.F.R. § 18.29(a), which describes the authority of administrative law judges, authorizes such judges to "'take any appropriate action authorized by the Rules of Civil Procedure for the United States District Courts . . ..'" *Id.* The Secretary determined that when an administrative law judge has issued an order of

[1] These procedures are found at 29 C.F.R. Part 24.

which a party seeks interlocutory review, it would be appropriate for the judge to follow the procedure established in 28 U.S.C.A. § 1292(b)(West 1993)[2] for certifying interlocutory questions for appeal from federal district courts to appellate courts. *Id.* In *Plumley*, the Secretary ultimately concluded that because no judge had certified the questions of law raised by the respondent in his interlocutory appeal as provided in 28 U.S.C.A. § 1292(b), "an appeal from an interlocutory order such as this may not be taken." (citations omitted).

In this case, the ALJ has denied Saproito's request for certification of the case for interlocutory review. Saporito argues, "[t]he ALJ's statement [denying certification] which speaks directly to the Claimant's request for 'certification' effectively acts to 'certify' the question of law about whether the Claimant has a right to present rebuttal witness testimony in the present case," C. R. at 2. This argument is not persuasive. The ALJ's denial of certification did not "effectively certify the question." To the contrary, the ALJ's refusal to certify the question most effectively **denied** certification of the question.

However, we need not decide whether the denial of certification is fatal to Saporito's request to file an interlocutory appeal. Even if the denial of certification was not dispositive, Saporito cannot prevail because, as we discuss below, he has failed to articulate any grounds warranting departure from our strong policy against such piecemeal appeals. *See e.g.*, *Amato v. Assured Transp. and Delivery, Inc.,* ARB No. 98-167, ALJ No. 98-TSC-6 (ARB Jan. 31, 2000); *Hasan v. Commonwealth Edison Co.,*

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[2] This provision states:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order. Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C.A § (West 1993).

ARB No. 99-097; ALJ No. 99-ERA-17 (ARB Sept. 16, 1999); *Carter v. B & W Nuclear Technologies, Inc.*, ALJ No. 94-ERA-13 (Sec'y Sept. 28, 1994).

The Board's policy against interlocutory appeals incorporates the final decision requirement found in 28 U.S.C.A. § 1291 (West 2001), which provides that the courts of appeals have jurisdiction "from all final decisions of the district courts . . . except where a direct review may be had in the Supreme Court." Accordingly, pursuant to § 1291, ordinarily, a party may not prosecute an appeal until the district court has issued a decision that, "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). The purpose of the finality requirement is "to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results." *Cohen v. Beneficial Indus. Loan Corp.,* 337 U.S. 541, 546 (1949).

Nevertheless, the Supreme Court has recognized a "small class [of decisions] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* In *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), the Court further refined the "collateral order" exception to technical finality. *Van Cauwenberghe v. Biard*, 406 U.S. 517, 522 (1988). The Court in *Coopers & Lybrand* held that to fall within the collateral order exception, the order appealed must "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." 437 U.S. at 468.

In determining whether to accept an interlocutory appeal, we must strictly construe the *Cohen* collateral appeal exception to avoid the serious "'hazard that piecemeal appeals will burden the efficacious administration of justice and unnecessarily protract litigation.'" *Corrugated Container Antitrust Litig. Steering Comm. v. Mead Corp*., 614 F.2d 958, 961 n.2, *cert. denied,* 449 U.S. 888 (1980), quoting *Nissan Motor Corp. Antitrust Litig.,* 552 F.2d 1088, 1094 (5th Cir. 1977).

Saporito argues that this case falls within the *Coopers and Lybrand* exception, arguing, "Notably, the Claimant believes that he has a 'due process' right to present rebuttal witness testimony in the present case in addition to the OALJ's Rules of Practice and Procedure, the Administrative Procedures Act, and such other laws and regulations which govern administrative procedures as in the instant matter." C. R. at 3. However, before the Board entertains the substantive issue whether Saporito has a due process right to present rebuttal evidence, we must first determine whether procedurally, it is appropriate for the Board to decide this issue upon interlocutory review. Applying the collateral order test to the facts of this case, we conclude that the ALJ's order denying Saporito's request to present rebuttal does not fall within the exception's coverage.

As we held in *Hasan v. Commonwealth Edison Co.,* ARB No. 99-097, ALJ No. 99-ERA-17, slip op. at 2 (Sept. 16, 1999), we are very reluctant to interfere with an

ALJ's control over the course of a hearing. In this case, the ALJ's ruling that Saporito may not present rebuttal evidence is not effectively unreviewable on appeal. If Saporito does not prevail before the ALJ and wishes to pursue this issue on appeal from the ALJ's recommended decision and order, we will consider it at that time. If we agree with Saporito that the ALJ erred and that the error was not harmless, we will remand the case to the ALJ for further proceedings consistent with our order. Accordingly, Saporito's motion for interlocutory review is **DENIED.**

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge