

In the Matter of:

CATE JENKINS,

COMPLAINANT,

v.

**UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,**

RESPONDENT.

**ARB CASE NOS. 16-027
16-046**

ALJ CASE NO. 2011-CAA-003

DATE: March 6, 2018

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Mick Harrison, Esq.; Paula Dinerstein, Esq.; *Public Employees for Environmental Responsibility*, Washington, District of Columbia

For the Respondent:

Joanna M. DeLucia, Esq.; *United States Environmental Protection Agency*, Washington, District of Columbia

Before: Joanne Royce, *Administrative Appeals Judge* and Leonard J. Howie III, *Administrative Appeals Judge*

DECISION AND ORDER OF REMAND

This case arises under the employee protection provisions of the Clean Air Act and its implementing regulations. 42 U.S.C.A. § 7622 (Thomson Reuters 2011); 29 C.F.R. Part 24 (2011).¹ Complainant Cate Jenkins alleged that her employer, the United States Environmental

¹ Jenkins also alleged violations of other environmental acts of Part 24: the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C.A. § 9610 (Thomson/West 2003) (CERCLA); the Federal Water Pollution Control Act of 1972, 42 U.S.C.A. §

Protection Agency (EPA), terminated her employment in retaliation for having engaged in protected activity. After an investigation, the Occupational Safety and Health Administration (OSHA) dismissed the complaint. Jenkins objected and requested a hearing before a Department of Labor (DOL) Administrative Law Judge (ALJ). The parties engaged in extensive discovery that resulted in multiple compel orders. When discovery was thought to have been completed, the ALJ scheduled a hearing. During the hearing, the ALJ discovered that Jenkins had not received material content from the EPA during discovery. The ALJ stopped the hearing and ordered further discovery. After a period of continued discovery and additional compel orders, the ALJ resolved the merits of the underlying claim in this matter in Jenkins's favor by Recommended Decision and Order issued April 15, 2015.²

A successful complainant under the environmental whistleblower statutes of 29 C.F.R. Part 24 is entitled to remedies including an award of reasonable attorney's fees. 29 C.F.R. § 24.109(d)(1). Jenkins petitioned the ALJ for an award of attorney's fees, costs, and for compensatory damages. The ALJ who had decided the case ordered supplemental briefing but retired thereafter. A substitute ALJ, on December 7, 2015, issued a Supplemental Decision and Order Awarding Reduced Attorney's Fees and Costs and Denying Compensatory Damages. On December 21, 2015, Jenkins filed a motion for reconsideration of the Supplemental Decision and Order with the ALJ.

On December 28, 2015, Jenkins filed a petition for review with the ARB appealing the ALJ's December 7, 2015 Supplemental Decision and Order. On December 30, 2015, the ARB accepted the petition for review, which became ARB No. 16-027, Jenkins's first petition for review on attorney's fees, costs, and compensatory damages.

On March 2, 2016, while the ALJ's December 7, 2015 Supplemental Decision and Order was pending before the ARB, the ALJ issued an order Granting Partial Reconsideration of Supplemental Decision and Order Awarding Reduced Attorney's Fees and Costs and Denying Compensatory Damages. On March 16, 2016, Jenkins filed a petition of review of the ALJ's March 2, 2016 Order Granting Partial Reconsideration. The second appeal was given a new docket number, ARB No. 16-046. On March 24, 2016, the Board issued an order in ARB No. 16-046 requiring the parties to show cause why it should not refuse to accept the petition. Jenkins filed a response to the show cause order. The EPA did not respond.

DISCUSSION

When the ALJ issued the second attorney's fees and remedies order, it did not have jurisdiction of the case. Jenkins properly appealed the remedies decision to the ARB, and the

1367 (Thomson Reuters 2016) (FWPCA); the Solid Waste Disposal Act of 1976, 42 U.S.C.A. § 6971 (Thomson Reuters 2011) (SWDA); and the Toxic Substances Control Act of 1976 (TSCA), 42 U.S.C.A. § 2622 (Thomson Reuters 2009).

² The EPA filed a petition for review of the merits of the April 15, 2015 Decision and Order, which the Administrative Review Board (ARB or Board) accepted and decided concurrently (ARB No. 15-046) with this Decision and Order of Remand (ARB Nos. 16-027, 16-046).

ARB had accepted the petition.³ Regulation 29 C.F.R. § 18.94 (2017) gives three options to ALJs who receive a motion for relief following an order that has been accepted for review by the Board.

29 CFR § 18.94 Indicative ruling on a motion for relief that is barred by a pending petition for review.

(a) *Relief pending review.* If a timely motion is made for relief that the judge lacks authority to grant because a petition for review has been docketed and is pending, the judge may:

(1) Defer considering the motion;

(2) Deny the motion; or

(3) State either that the judge would grant the motion if the reviewing body remands for that purpose or that the motion raises a substantial issue.

(b) *Notice to reviewing body.* The movant must promptly notify the clerk of the reviewing body if the judge states that he or she would grant the motion or that the motion raises a substantial issue.

(c) *Remand.* The judge may decide the motion if the reviewing body remands for that purpose.

The ALJ's Order granting reconsideration was not one of the permitted actions. We will treat the March 2, 2016 Order as a prospective order per § 18.94(a)(3) and Jenkins's petition for review as notice under § 18.94(b).⁴ Accordingly, the Board remands the matter to the ALJ to

³ The ARB has jurisdiction to review the ALJ's decision pursuant to Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,379 (Nov. 16, 2012); 29 C.F.R. Part 24.

⁴ Jenkins agrees with this approach.

permit the ALJ to properly consider the December 21, 2015 motion for reconsideration. Jenkins's Petition for Review of the ALJ's March 2, 2016 Order Granting Partial Reconsideration, docketed as ARB No. 16-046, having not been accepted for review, is accordingly rendered moot.

SO ORDERED.

JOANNE ROYCE
Administrative Appeals Judge

LEONARD J. HOWIE III
Administrative Appeals Judge