In the Matter of:

EDWIN A MELENDEZ, **ARB CASE NO. 03-153**

COMPLAINANT, **ALJ CASE NO. 93-ERA-6**

v. **DATE: March 30, 2004**

EXXON CHEMICAL AMERICAS,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Valorie W. Davenport, Esq., ***Davenport Legal Group, Houston, Texas***

For the Respondent:
F. Walter Conrad, Esq., Teresa S. Valderrama, Esq., ***Baker & Botts, L.L.P., Houston, Texas***

FINAL DECISION AND ORDER

BACKGROUND

On September 2, 2003, a Department of Labor Administrative Law Judge (ALJ) issued a Recommended Decision and Order on Remand (R. D. & O.) in this case arising under the whistleblower protection provisions of the Energy Reorganization Act, 42 U.S.C.A § 5851 (West 1995). The Administrative Review Board had remanded this case because the Administrative Law Judge, who originally heard the case, improperly excluded potentially relevant evidence. Therefore the Board remanded the case to allow the Complainant, Edwin A. Melendez, and the Respondent, Exxon Chemicals Americas, to develop a complete record. *Melendez v. Exxon Chem. Americas*, ARB No. 96-051, ALJ No. 93-ERA-00006 (ARB July 14, 2000). On remand, the ALJ recommended in his R. D. & O. that Melendez's complaint be dismissed because, after several extensions of time, Melendez had failed to respond adequately to the ALJ's order requiring him to identify the evidence that the original Administrative Law Judge improperly excluded.

Pursuant to 29 C.F.R. § 24.8, Melendez filed a timely petition requesting the Board to review the ALJ's R. D. & O. On September 17, 2003, the Board issued a Notice of Appeal and Order Establishing Briefing Schedule permitting Melendez to file his opening brief in support of his petition for review on or before October 20, 2003.

On October 20, 2003, Melendez filed his First Motion for Extension of Time to File Complainant's Brief. In an Order dated October 21, 2003, the Board granted Melendez's motion and permitted him to file an opening brief on or before November 21, 2003.

On November 21, 2003, Melendez filed his Second Motion for Extension of Time. By Order dated November 26, 2003, the Board granted the Motion and permitted Melendez to file his opening brief on or before December 22, 2003.

On December 23, 2003, Melendez filed his Third Motion for Extension of Time. Asserting that a computer malfunction had erased the almost completed brief, Melendez requested four days, i.e., until December 26, to reconstruct the brief. The Board accepted Melendez's untimely-filed motion and issued an order permitting Melendez to file a brief if received on or before December 26, 2003.

The Board did not receive a brief or any communication of any kind from Melendez on December 26, 2003. On January 6, 2004, Exxon filed a Motion to Dismiss Melendez's appeal on the grounds that Melendez had failed to comply with the Board's reasonable briefing orders.

On January 9, 12 and 13, 2004, the Board's Staff Assistant contacted Melendez's counsel's firm to inquire whether Melendez had failed a brief, but Melendez's counsel did not speak with the Staff Assistant until the afternoon of January 13. Counsel confirmed that no brief had been filed, but indicated that it would be filed on January 14. The Board received a brief and Final Motion to Extend Time to File Petitioner's Brief on January 21, 2004, however, the certificate of service indicating that it had been mailed on January 14 was not signed by counsel.

On January 23, 2004, the Board issued an order requiring Melendez to show cause why his appeal should not be dismissed for his failure to timely prosecute it. Melendez timely filed his response to the Show Cause Order.

DISCUSSION

Courts possess the "inherent power" to dismiss a case for lack of prosecution. *Link v. Wabash Railroad Co.,* 370 U.S. 626, 630 (1962). In *Mastrianna v. Northeast Utilities Corp.,* ARB No. 99-012, ALJ No. 98-ERA-33, (Sept. 13, 2000), the Board dismissed a complaint in a case in which the complainant failed to adequately explain his failure to comply with the Board's briefing schedule. The Board explained that it has the inherent power to dismiss a case for want of prosecution in an effort to control its docket and to promote the efficient disposition of its cases. Slip op. at 2.

Although offered ample opportunities to do so, Melendez failed to file a brief in compliance with the Board's briefing schedule. Moreover, after failing to file a brief as specified in the Board's third order granting an enlargement of time, Melendez failed to communicate with the Board to request additional time or to explain his failure to file a brief for an additional 18 days and only then after the Board's Staff Assistant called Melendez's counsel on several occasions.

Melendez's counsel has detailed in her response to the Board's Show Cause Order, her difficulty in producing the brief due to a computer malfunction, which resulted in the erasure of the nearly completed brief on several occasions and the professional and personal difficulties and disruptions that she has experienced as a result of two hospitalizations and prolonged recovery. The Board has attempted to accommodate these difficulties by granting three motions for enlargement, one of which was filed out of time. However, Melendez's counsel has not explained why, after missing the December 26 deadline, she failed to initiate any contact with the Board and only communicated with the Board after the Board's Staff Assistant called her on three occasions over a four-day period. Surely, counsel was not so consumed with her professional and personal difficulties between December 26 and January 13 that she could not have spared a few minutes to communicate with Board. Her failure to do so evidences her lack of respect for the Board and its orders and an abdication of her professional responsibilities to this Board and to her client. As the Eleventh Circuit Court of Appeals recently held:

> In the courts, there is room for only so much lenity. The district court must consider the equities not only to plaintiff and his counsel, but also to the opposing parties and counsel, as well as to the public, including those persons affected by the court's increasingly crowded docket. … Deadlines are not meant to be aspirational; counsel must not treat the goodwill of the court as a sign that, as long as counsel tries to act, he has carte blanche permission to perform when he desires. A district court must be able to exercise its managerial power to maintain control over its docket …. This power is necessary for the court to administer effective justice and prevent congestion.

Young v. City of Palm Bay, Fla., 358 F.3d 859, 864 (2004)(citations omitted).

While we recognize that Melendez is not personally responsible for the failure of his attorney to timely file a brief:

> Ultimately, clients are accountable for the acts and omissions of their attorneys. *Pioneer Investment Services Co., v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 396 (1993); *Malpass v. General Electric Co.*, Nos. 85-ERA-38, 39 (Sec'y Mar. 1, 1994). As the Supreme Court

held in rejecting the argument that holding a client responsible for the errors of his attorney would be unjust:

> Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all fact, notice of which can be charged upon the attorney." *Link v. Wabash Railroad Company*, 370 U.S. 626, 633-634 (1962) (quoting *Smith v. Ayer*, 101 U.S. 320, 326 (1879)).[1]

Gass v. United States Dep't of Energy, ARB No. 03-035, ALJ No. 02-CAA-2, slip op. at 7 (Jan. 14, 2004).

Accordingly, because Melendez has failed to file his brief in compliance with the Board's Orders, although given ample opportunities to do so, and thus has failed to prosecute his case, we **DISMISS** his complaint.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

[1] The Court did note, however, "[I]f an attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice." 370 U.S. at 634 n.10.