In the Matter of:

NOBUKAZU MIKAMI,

COMPLAINANT,

v.

ADMINISTRATOR, WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,

PROSECUTING PARTY,

and

A.G. SCHMIDT, INC.,

RESPONDENT.

ARB CASE NO. 13-005

ALJ CASE NO. 2012-LCA-025

DATE: June 16, 2014

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Steven C. Wolan, Esq., and Clariza C. Garcia, Esq.; *Patton Wolan Carlise, LLP,* Oakland, California

For the Prosecuting Party:

M. Patricia Smith, Esq.; Jennifer S. Brand, Esq.; William C. Lesser, Esq.; Paul L. Frieden, Esq.; Quinn Philbin, Esq.; *U.S. Department of Labor,* Washington, District of Columbia

Before: Paul M. Igasaki, Chief Administrative Appeals Judge; Joanne Royce, *Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

Nobukazu Mikami petitioned the Administrative Review Board to review a Decision and Order Approving Consent Findings (D. & O.)[1] issued on August 29, 2012, by a Department of Labor Administrative Law Judge (ALJ) under the H-1B provisions of the Immigration and Nationality Act, as amended.[2] We hold that because Mikami failed to take any steps to participate in the proceedings before the ALJ or to object to the Settlement Agreement and Consent Findings, while the case was pending before the ALJ, he has failed create a record that would allow the Board, on appeal, to find that that he is entitled to a larger back-pay payment than that to which the Administrator (the Prosecuting Party) and the Respondent A.G. Schmidt (the H-1B employer) agreed upon in resolution of the H-1B complaint.

BACKGROUND

In response to a complaint filed by H-1B employee Mikami, the Wage and Hour Administrator issued a Determination on February 8, 2012, finding that A.G. Schmidt, Inc., the H-1B employer owed Mikami $114,042.88 in back wages and assessing a civil money penalty of $900 for A.G. Schmidt's failure to cooperate in the investigation. A.G.

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[1] The ARB has jurisdiction to review an ALJ's decision arising under the INA. 8 U.S.C.A. § 1182(n)(2); 20 C.F.R. § 655.845; Secretary's Order No. 02-2012, 77 Fed. Reg. 69,378 (Nov. 16, 2012) (delegating to the ARB the Secretary's authority to review cases arising under the INA). The Board has plenary power to review an ALJ's legal conclusions de novo. *Gupta v. Compunnel Software Grp., Inc.*, ARB No. 12-049, ALJ No. 2011-LCA-045, slip op. at 8 (ARB May 29, 2014).

[2] 8 U.S.C.A §§ 1101(a)(15)(H)(i)(b), 1182(n), 1184(c) (West 1999 & Thomson Reuters Supp. 2012) (INA). The INA's H-1B provisions permit employers in the United States to hire foreign nationals (H-1B workers) in certain "specialty occupations" defined by the INA and its implementing regulations. 8 U.S.C.A. §§ 1101(a)(15)(H)(i)(b), 1184(i)(1). An employer seeking to hire an H-1B worker must obtain DOL certification by filing a labor condition application (LCA) and attesting that it will employ an identified person for a specific job, at a specified place, for a specified time, and at a specified wage. If the DOL certifies the LCA, the would-be employer then files a petition with the Department of Homeland Security's USCIS. If USCIS grants the petition and authorizes H-1B status for the non-immigrant, the worker applies for an H-1B visa with the Department of State. Only when the State Department has issued the H-1B visa (or approved a change in visa status if the non-immigrant is already in the U.S.) can the non-immigrant work for the employer at the job set forth under the LCA. 20 C.F.R. § 655.705(a), (b) (2013).

Schmidt filed a timely request for a hearing on the determination before a Department of Labor ALJ.[3] Mikami, as an interested party, had the option of either requesting a hearing,[4] or requesting the ALJ for permission to participate either through intervention as a party or as an amicus curiae.[5] Mikami did neither, and thus was not a party-participant in the ALJ proceedings.[6]

On August 23, 2012, Counsel for the Administrator, informed Mikami's attorney at that time, Timothy P. O'Donnell, that the Prosecuting Party and the employer had reached a settlement of the complaint.[7] On August 29, 2012, the ALJ issued his D. & O. approving the settlement agreement and consent findings, after reviewing "the record and the terms of the Parties' Settlement Agreement and Consent Findings" and determining "that the terms of the settlement are fair and reasonable."[8]

DISCUSSION

Upon notice that Respondent had requested a hearing on the Administrator's February 8, 2012 Determination, Mikami failed to either intervene or participate as an amicus. On August 23, 2012, Counsel for the Administrator informed Mikami's counsel that a settlement had been reached. Again, Mikami took no action. He did not attempt to intervene, nor did he file any objection to the settlement with the ALJ. On August 29, 2012, the ALJ issued the D. & O. approving the parties' settlement of the complaint before him. Mikami did not request the ALJ to reconsider his decision. Given Mikami's failure to participate in the ALJ proceedings or to assert any objection to the settlement that the parties reached during these proceedings,[9] we will not, on appeal, disturb the

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[3] *See* 20 C.F.R. § 655.820(a), (b)(2). The regulations provide that where the employer requests a hearing, the Administrator shall be the prosecuting party and the employer shall be the respondent.

[4] 20 C.F.R. § 655.820(b)(2).

[5] 20 C.F.R. § 655.820(d).

[6] Although it does not appear that either the Respondent or the ALJ served Mikami with a copy of the hearing request as required by the regulations, *see* 20 C.F.R.§ 655.820(f), 20 C.F.R. § 655.835 (b), Mikami conceded that he was aware of the proceedings, no later than June 2012. Petition for Review (Sept 27, 2012)(Timeline).

[7] Declaration of Timothy P. O'Donnell in Support of Complainant's Reply Brief at 2.

[8] *Administrator, Wage & Hour Div. v. A.G. Schmidt, Inc.*, ALJ No. 2012-LCA-025, slip op. at 1.

[9] While we recognize that Mikami may not be personally responsible for the failure of his attorney to participate in the ALJ proceedings or to object to the settlement agreement during the course of those proceedings, parties are ultimately responsible for the acts and

settlement of the complaint entered into by the Prosecuting Party and the Respondent, who litigated this case before the ALJ and opted to conclude that litigation with a Settlement Agreement and Consent Findings.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

Luis A. Corchado*, Administrative Appeals Judge, concurring.*

Although the regulations are silent on many important questions in this case, I concur in the result because I believe that the specific procedural history and undisputed facts in this case raise a narrow question on appeal. When a complainant relies on 20 C.F.R. § 655.845 to first enter an adjudicatory proceeding after an ALJ's final decision, and where the complaining party knew of the proceedings before the ALJ, logic suggests that the complainant can challenge only the ALJ's final decision from the ALJ's perspective. Allowing the complainant to challenge any part of the proceedings, from the same perspective as a participating party, would unravel the administrative appeal process. In this case, then, the narrow question is whether the ALJ erred in dismissing this case based upon the "Settlement and Consent Findings" executed by all the parties that had entered in the case while it was pending before the ALJ.

Mikami fails to raise a reversible error. Only two parties appeared before the ALJ in this matter and they agreed to a consent finding that (1) A.G. Schmidt owed $35,000 in back wages and (2) it would pay that amount within 90 days. It is undisputed that the Settlement and Consent Findings did not reflect Mikami's agreement or his signature.[10]

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omissions of their freely chosen representatives. *Ellison v. Washington Demilitarization Co.*, ARB No. 08-119, ALJ No. 2005-CAA-009, slip op. at 8 (ARB Mar. 16, 2009). As the Supreme Court held in *Link v. Wabash Railroad Co.*, "[a]ny 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.'" 370 U.S. 626, 633-634 (1962) (quoting *Smith v. Ayer*, 101 U.S. 320, 326 (1879)). The Court in *Link* did note, however, that "if 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.

[10] In explaining its authority to settle Mikami's $114,042.88 back wage claim for $35,000, the Administrator presented no substantive authority but only pointed to a procedural rule (29 C.F.R. § 18.9) governing administrative proceedings before the Office of

But no party filed an objection with the ALJ. As the majority explained, the record shows that Mikami's attorney knew about the settlement negotiations before the ALJ approved the settlement and, therefore, the attorney had opportunities to object. From the ALJ's perspective, the parties agreed to resolve the pending litigation matter, the Administrator's initial findings were sent to Mikami, and no other party sought to intervene. The extent to which the Administrator's settlement resolved all of Mikami's rights without his signature is an issue that Mikami did not raise or preserve before the ALJ approved the settlement and dismissed the case.

With respect to the Board's review of the ALJ's approval of the settlement, Mikami concedes critical points that demonstrate that there were reasons for the Administrator to compromise and end its prosecution: (1) the LCA attested to part time employment; (2) Mikami had not worked for A.G. Schmidt since October 1, 2008, the first day of the H-1B authorized work period;[11] and (3) "A.G. Schmidt successfully notified the termination [of his employment] to DHS, but not to [him]."[12] All of these reasons suggest that the Administrator's pursuit of $114,000 in back wages might have encountered some serious challenges, justifying some level of compromise. Nothing suggests that the compromise in this case exceeded the bounds of reason. In the end, I find no reversible error and the important questions in this case will not be answered by this case.

LUIS A. CORCHADO
Administrative Appeals Judge

Administrative Law Judges. Aside from the question of settlement authority, the Administrator pointed to no rule that authorized it to amend findings after a request for hearing was filed pursuant to 20 C.F.R. § 655.820. Typically, interested parties have 15 days to request a hearing. In this case, after the Administrator amended the findings, Mikami did not request a hearing within 15 days after the Administrator amended the findings and he did not make this argument on appeal or seek equitable tolling.

[11] See Declaration of Complainant Nobukazu Mikami in Support of Complainant's Opening Brief, Exhibit A.

[12] See Petition for Review, p. 4.