



In the Matter of:

STEVEN WITBECK,

ARB CASE NO. 15-077

COMPLAINANT,

ALJ CASE NOS. 2013-SOX-001
2014-SOX-040

v.

DATE: MAR 15 2017

CH2M HILL LTD., DENNIS BURRELL,
BOB DANKS, AND TAGGERT HANSEN,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Steven Witbeck, *pro se*, Roseburg, Oregon

For the Respondents:

Janie F. Schulman, Esq.; *Morrison & Foerster LLP*, Los Angeles, California

Before: Joanne Royce, *Administrative Appeals Judge*; Tanya L. Goldman, *Administrative Appeals Judge*; and Leonard Howie, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

This case arises under the whistleblower protection provisions in Section 806 of the Corporate and Criminal Fraud Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C.A. § 1514A (Thomson West Supp. 2016) (SOX), and the Federal Water Pollution Control Act, 33 U.S.C.A. § 1367 (West 2001) (Clean Water Act), and their implementing regulations found at 29 C.F.R. Part 1980 (2016) (SOX) and 29 C.F.R. Part 24 (2016) (Clean Water Act). Complainant Steven Witbeck failed to participate in all pre-trial disclosures and waived his right to participate in a scheduled hearing, despite numerous pre-hearing warnings from the Administrative Law Judge (ALJ) that Complainant's failure to present evidence in support of his

case would be fatal to his claim. At the hearing, Respondents moved for a directed verdict based on Complainant's failure to meet his burden of proof on his claims. The ALJ granted the motion, dismissed Complainant's claims with prejudice for the reasons provided on the record, and followed up with a written Decision and Order. Complainant appealed to the Administrative Review Board (ARB or Board). We affirm the ALJ's decision.

BACKGROUND

Witbeck was a project manager for Operations Management International, a subsidiary of CH2M Hill Co. (collectively "CH2M Hill").¹ Witbeck filed a complaint with the Occupational Safety and Health Administration (OSHA) on May 27, 2011, alleging that CH2M Hill reprimanded him, placed him on leave, and denied him bonuses, among other adverse actions, in retaliation for his reporting unusual billing practices. OSHA dismissed his complaint on September 13, 2012. The case was assigned to the ALJ (ALJ No. 2013-SOX-001).

In April 2013, while that case was pending before the ALJ, CH2M Hill terminated Witbeck for what it described as confrontational behavior with regulatory officials and failure to notify management of an inspection. Thereafter, Witbeck filed a second claim against CH2M Hill and three individuals (collectively, "Respondents"), alleging whistleblower retaliation under SOX as well as retaliation under Section 11(c) of the Occupational Safety and Health Act and the Clean Water Act. OSHA dismissed the SOX and Clean Water Act claims on June 9, 2014.² Witbeck filed objections, and the case was assigned to the same ALJ (ALJ No. 2014-SOX-040), who consolidated the cases. After several continuances, the ALJ scheduled a hearing for July 22, 2015.

Prior to the hearing, the parties and the ALJ participated in several pre-hearing conferences. Although initially represented by counsel, as the hearing approached Witbeck was pro se. He refused to submit a witness list or exchange proposed exhibits with Respondents in compliance with the ALJ's pre-hearing order. In light of Witbeck's pro se status, the ALJ took great pains to make sure Complainant understood his obligations in terms of prosecuting his case. For example, the ALJ informed Witbeck multiple times in writing and orally during a several hour pre-hearing conference that Witbeck would not be permitted to introduce evidence at the hearing if he did not identify and disclose the exhibits to Respondents beforehand. *See, e.g.*, November 6, Pre-Hearing Conference, Transcript (Tr.) at 6-7, 22-23, 39, 47-48. The ALJ also discussed with Witbeck numerous times Complainant's responsibility for proving his prima facie case. *See, e.g.*, July 8 Pre-hearing Conference, Tr. at 10-13, 37, 65-68.

Throughout the pre-hearing process, Witbeck expressed his displeasure with OSHA's resolution of the case. The ALJ informed Witbeck that once Witbeck objected to OSHA's determination, the case was set for a de novo hearing before the ALJ. July 8 Pre-hearing

¹ The facts are taken from the procedural record, including the parties' briefs, Orders issued by the Office of Administrative Law Judges, and transcripts and decisions from the ALJ.

² The OSHA Section 11(c) claim has a separate appeal process and was not before the ALJ or the Board.

Conference, Tr. at 9-11, 16, 68; November 6 Conf., Tr. at 20-22, 46-47. The ALJ explained that this meant that he handled the litigation anew, with a new evidentiary record. July 8 Conf., Tr. at 66-67. The ALJ would not rely on OSHA's investigation, submissions to OSHA investigators, or OSHA's determination.

Witbeck persistently refused to accept the ALJ's explanations that the proceedings before him were de novo, contending that he had already met his burden of proving a prima facie case during OSHA's investigation. On July 15, 2015, Witbeck informed the ALJ by letter that he did not intend to show up for the July 22 hearing because he believed the ALJ was biased and the ALJ did not have jurisdiction as the case was still with OSHA. Witbeck considered his case won on OSHA pleadings alone and argued that the only matter to dispute between the parties was damages. Witbeck also claimed that he was entitled to summary decision and that an Oregon employment compensation determination that he was not guilty of misconduct collaterally estopped the ALJ from finding for Respondents.

The ALJ treated Complainant's July 15 letter as a motion for reconsideration of his rulings during the pre-hearing conference. He denied the motion in a July 16, 2015 order. In the order, the ALJ explicitly warned Witbeck multiple times of the consequences of his failure to appear at the hearing. The ALJ cited 29 C.F.R. § 18.21, which states that a party's failure to appear at hearing may result in dismissal if a party has not waived the right to participate. On July 16, 2015, Witbeck replied, waiving his right to a hearing and repeating some of his earlier arguments. On July 17, 2015, the ALJ issued a supplemental order acknowledging Witbeck's waiver and stating that he would not consider Witbeck's case defaulted in light of the waiver. The ALJ re-emphasized, however, that Witbeck still needed to present his evidence at hearing to prove his claims. *See, e.g.*, July 16 Order at 2 ("If Complainant chooses to rely on the OSHA's Findings and to offer no evidence to meet his burden, he runs the risk of having all of his claims dismissed on the merits in their entirety."). The ALJ rejected, without prejudice, Witbeck's collateral estoppel argument and attempt to argue for summary decision as it was too close to hearing for Witbeck to move for summary decision and because Complainant had not presented any evidence in support of his motion.

That same day, Complainant sent another letter to the ALJ, attaching documentation of the Administrative Decision of the Oregon Employment Department and again waiving his participation in the hearing. On July 17, 2015, the ALJ issued another order again denying the motion for summary decision and reiterating that the hearing was a de novo proceeding.

On July 22, 2015, the ALJ and Respondents showed up for the scheduled hearing but Witbeck did not. Respondents moved for directed verdict insofar as Witbeck did not introduce any evidence to support his claim. The ALJ granted the motion, providing, *inter alia*, the following reasons on the record:

The Complainant in cases under these statutes has the burden not only of going forward with the production of evidence, but of persuading the fact finder on a number of elements of the claim in order to prevail. The Respondents carry no burden whatsoever until the Complainant has met that burden. In this case, in the

pretrial activity, I notified the Complainant about the issues that would have to be addressed, what his burden was on those issues, and that this would be a hearing de novo. I explained to him what a hearing de novo was, that he could not rely on any submissions he made at the Occupational Health & Safety Administration, and that he had to present a case at this office—the Office of Administrative Law Judges that included all of the evidence needed to meet the burden that he carries. He seemed to take the view that OSHA had made findings favorable to him and I explained to him why that was not sufficient and, also, that he was misreading the OSHA's determinations which, in fact, did not find that he was able to present a prima facie case on either of the two administrative complaints.

The Complainant also, more recently, seems to be relying on the allegations of the complaints that he filed. I have notified him that allegations in a complaint are just that. They are allegations, they are not evidence. . . . They don't prove anything. He must present evidence that is subject to cross-examination, subject to evidentiary objections, and otherwise participate in the hearing if he wants to carry his burden. He didn't do that.

....

So, despite being warned of what his obligations were, that this was a de novo hearing and the other things that I've mentioned, Mr. Witbeck has chosen voluntarily not to participate in the hearing and that is his right. But having voluntarily waived his right to participate in a hearing, he is not here to present anything and for that reason, I'm granting the motion.

The Complainant has failed to meet his burden to show that Complainant engaged in protected activity under each of the two Acts. That Respondents, and each of them, took adverse action against him. That the persons who took the adverse action knew about Complainant's protected activity at the time of the adverse action. And that the protected activity was a contributing factor in the adverse action. As he has failed on every single one of these elements, his claim is without merit and must be dismissed.

July 22, Hearing, Tr. at 6-8. The ALJ's decision and order, incorporating by reference the reasons he provided on the record, followed on July 24, 2015. Witbeck appealed to the ARB.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated the authority to issue final administrative decisions in cases arising under SOX and the Clean Water Act to the ARB. 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); see also 29 C.F.R. § 1980.110; 29 C.F.R. § 24.110. We review the ALJ's conclusions of law de novo. *Getman v. Sw. Sec., Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-008, slip op. at 7 (ARB July 29, 2005).

DISCUSSION

The Board affirms the ALJ's Decision and Order. To prevail on his SOX claim, Witbeck had the burden of proving, by a preponderance of evidence, that he: (1) engaged in activity protected by the statute; (2) that he suffered an adverse employment action; and (3) that the employer was aware of the protected activity and that the protected activity was a contributing factor in the adverse action. 29 C.F.R. § 1980.109(a); *Stewart v. Lockheed Martin, Aeronautics, Co.*, ARB No. 14-033, ALJ No. 2013-SOX-019, slip op. at 2 (ARB Sept. 10, 2015). For his Clean Water Act claim, Complainant had the same burden, except he had to prove that the protected activity caused or was a motivating factor in the adverse action. *Abdur-Rahman v. Dekalb Cty.*, ARB Nos. 08-003, 10-074; ALJ Nos. 2006-WPC-002, 2006-WPC-003; slip op. at 7 (ARB May 18, 2010); 29 C.F.R. § 24.109(b)(2). If the complainant establishes these elements of his whistleblower claim, the employer can avoid liability if it establishes by clear and convincing evidence that it would have taken the adverse actions notwithstanding the protected activity. 29 C.F.R. § 1980.109(b); 29 C.F.R. § 24.109(b)(2).

As the ALJ held, not only did Witbeck fail to prove those elements, he failed to show up for the hearing or enter any evidence or witness testimony whatsoever. On appeal, Witbeck repeats many of his misunderstandings about OSHA procedure and the ALJ's de novo hearing. As the ALJ held, when a complainant files objections and requests a hearing, OSHA's determination is set aside and the case is tried de novo before the ALJ. 29 C.F.R. § 1980.107(b) ("Hearings will be conducted de novo, on the record."); 29 C.F.R. 24.107(b) (same). See also 29 C.F.R. § 1980.109(c) (noting the ALJ has no authority to review OSHA determinations; "[r]ather, if there otherwise is jurisdiction, the ALJ will hear the case on the merits or dispose of the matter without a hearing if the facts and circumstances warrant.>").

The ALJ's procedure mimics that of other courts: parties engage in discovery; the judge issues a pre-hearing order; the parties exchange submissions in preparation for hearing; and the parties present evidence during the hearing. As part of this process, a party is free to re-submit evidence to the ALJ that it also presented to investigators during an administrative investigation. We fully agree with the ALJ: OSHA pleadings are not evidence and Witbeck needed to participate in pre-hearing procedures and show up for hearing to formally introduce evidence, even if it was to offer records from the OSHA proceedings into the record, 29 C.F.R. § 18.82(g), or to present his own testimony. July 22, 2015 Tr. at 6-8. Witbeck's failure to present evidence is fatal to his claim.

The Board is cognizant of Complainant's pro se status in this matter, but notes that "a pro se litigant 'cannot generally be permitted to shift the burden of litigating his case to the courts, nor avoid the risks of failure that attend his decision to forego expert assistance.'" *Pik v. Credit Suisse AG*, ARB No. 11-034, ALJ No. 2011-SOX-6, slip op. at 4-5 (ARB May 31, 2012) (quoting *Ray's Lawn & Cleaning Svcs.*, ARB No. 06-112, slip op. at 7-8 (ARB Aug. 29, 2008)). "Thus, although an ALJ has some duty to assist pro se litigants, a judge also has a duty of impartiality and must refrain from becoming an advocate for the pro se litigant. In the end, pro se litigants have the same burdens of proving the necessary elements of their cases as litigants represented by counsel." *Id.* at 5 (internal citations omitted). The ALJ here made significant efforts to ensure that Complainant understood these burdens.

Because Witbeck did not show up for hearing and did not introduce any evidence, the ALJ was correct to grant Respondents' motion for directed verdict. Accordingly, we **DENY** Witbeck's petition for review.³

SO ORDERED.

[REDACTED]

TANYA L. GOLDMAN
Administrative Appeals Judge

[REDACTED]

JOANNE ROYCE
Administrative Appeals Judge

[REDACTED]

LEONARD HOWIE
Administrative Appeals Judge

³ In denying the appeal, we grant Respondents' motion to strike various submissions contained in Witbeck's appendix submitted to the ARB. The record closed when the ALJ concluded the hearing. 29 C.F.R. § 18.90(a) (2016). As Respondents argue, Witbeck is not permitted, without permission, to supplement the record after it closed with content that was not submitted to and accepted into the record by the ALJ. *Id.* Witbeck has not satisfied the standard for reopening the record. *Hoffman v. Nextera Energy, Inc.*, ARB No. 12-062, ALJ No. 2010-ERA-011, slip op. at 13 (ARB Dec. 17, 2013).