
In the Matter of the Compensation of
REBECCA J. CARTWRIGHT, Claimant
WCB Case No. 01-09128
ORDER ON REVIEW (REMANDING)
Claimant Unrepresented
James B Northrop, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Biehl, Bock, and Langer. Member Langer dissents.

Claimant, *pro se*, requests review of Administrative Law Judge (ALJ) Black's order that dismissed her request for hearing. On review, the issue is the propriety of the ALJ's dismissal order. We remand.

FINDINGS OF FACT

Claimant, through her attorney of record, filed a hearing request on November 20, 2001 regarding the SAIF Corporation's denial. A hearing was scheduled for February 27, 2002. Before the convening of the scheduled hearing on that date, claimant's counsel advised SAIF's counsel and the ALJ that claimant's hearing request was withdrawn.

On March 21, 2002, claimant's counsel submitted a letter requesting that the hearing be rescheduled. Claimant's counsel explained that "claimant did not wish to withdraw her request for hearing as previously suggested." In response, SAIF objected to any rescheduling of the hearing. Noting that it was prepared to litigate the denial at the scheduled hearing, SAIF asserted that it was inappropriate to allow claimant to proceed in the absence of establishing grounds for a continuance or postponement of the hearing.

On May 7, 2002, the ALJ issued an Order of Dismissal. Finding that claimant had not established grounds for postponement of the hearing, the ALJ dismissed claimant's hearing request. Claimant, *pro se*, requested Board review.

CONCLUSIONS OF LAW AND OPINION

On review, claimant contests the ALJ's dismissal of her hearing request. Based on the following reasoning, we vacate the ALJ's dismissal order and remand.

First, an ALJ retains jurisdiction over a matter unless and until a hearing request is dismissed via an ALJ's order. *David J. Keller*, 49 Van Natta 697 (1997); *Senetra Smith-Wampler*, 48 Van Natta 593, *on recon* 48 Van Natta 1041 (1996). Jurisdiction over a request for hearing is dependent on a dismissal of the request, not the withdrawal of the request. *Smith-Wampler*, 48 Van Natta at 1041. Thus, although a withdrawal of a request for hearing may initiate the dismissal process, it is the dismissal order that terminates the ALJ's authority to hear the matter.¹ *See Mary J. McFadden*, 44 Van Natta 2414 (1992).

Second, in this case, claimant personally failed to appear at the February 2002 hearing. However, claimant did appear by counsel, who (as previously noted) withdrew the hearing request. OAR 438-006-0071² does not provide authority for dismissal of a hearing request for failure of a claimant to appear at hearing if claimant's attorney appears on his or her behalf. *Richard Ensinger*, 51 Van Natta 956, 956 (1999) (because the claimant's attorney appeared at the hearing on the claimant's behalf, the request for hearing should not have been dismissed pursuant to OAR 438-006-0071); *see Williams v. SAIF*, 99 Or App 367 (1989) (neither former OAR 438-06-071 nor ORS 656.283(7) require a claimant to personally attend a hearing; therefore, an ALJ is not authorized to dismiss a hearing request for the failure of a claimant to appear if a claimant's counsel appears on his or her behalf); *Mary E. Williams*, 42 Van Natta 2765 (1990).

¹ In reaching this conclusion, we distinguish those cases in which a claimant's attorney withdrew a hearing request and the ALJ issued a dismissal order. *See generally James L. Butler*, 52 Van Natta 1510 (2000). In those cases, when the claimant appealed the dismissal order, we affirmed because the attorney was authorized to withdraw the request and the ALJ dismissed the request based on the attorney's action. Here, in contrast, claimant's attorney retracted the withdrawal of the hearing request before a dismissal order was issued.

² OAR 438-006-0071 provides:

(1) A request for hearing may be dismissed if an Administrative Law Judge finds that the party that requested the hearing has abandoned the request for hearing or has engaged in conduct that has resulted in an unjustified delay in the hearing of more than 60 days.

(2) Unjustified failure of a party or the party's representative to attend a scheduled hearing is a waiver of appearance. If the party that waives appearance is the party that requested the hearing, the Administrative Law Judge shall dismiss the request for hearing as having been abandoned unless extraordinary circumstances justify postponement or continuance of the hearing.

Here, claimant's attorney appeared at the time of the scheduled hearing on behalf of claimant. However, rather than proceeding with the hearing, the attorney withdrew the hearing request. Thereafter, prior to the issuance of the ALJ's order dismissing the hearing request, claimant's attorney retracted the withdrawal of the hearing request. Thus, the issue before us is the effect of the "pre-dismissal order" retraction.

In cases involving a dismissal order under the former version of OAR 438-006-0071, we have held that, when the ALJ erroneously dismissed a hearing request based on a claimant's failure to appear at hearing (but where the claimant's attorney was present), the procedure for conduct of the hearing on remand depends on whether or not a postponement should have been granted. If a postponement should have been granted, then the hearing should be conducted as any other hearing. If, however, a postponement should have been denied, then no exhibit may be received which was not submitted in connection with the prior hearing and no witness, including the claimant, may testify if that witness was not available to testify at the prior hearing. *Ensinger*, 51 Van Natta at 957; *see Mario Miranda*, 42 Van Natta 405 (1990).

Our analysis in this case is similar to the analysis applied in *Ensinger*.³

Here, on March 21, 2002, before the ALJ issued his dismissal order pertaining to claimant's withdrawal of her hearing request, claimant requested that the matter be rescheduled. Thus, although claimant was not present at the scheduled hearing, her attorney was in attendance. Under these circumstances, claimant's request for reinstatement of the hearing request is, in effect, a motion for postponement. OAR 438-006-0081(4) allows for a postponement if there is a finding of "extraordinary circumstances" beyond the control of the party requesting the postponement. *See also* OAR 438-006-0091.

After conducting our review of the record, we agree with the ALJ's determination that the circumstances in this case did not warrant postponement. It was clear that the request for hearing was being withdrawn by claimant's counsel

³ We acknowledge the dissent's point that here, unlike in *Ensinger*, claimant's counsel withdrew claimant's hearing request. Nonetheless, because that withdrawal was retracted prior to the issuance of the ALJ's dismissal order, this case is the functional equivalent to the situation presented in *Ensinger*; *i.e.*, claimant's non-appearance at a scheduled hearing and her counsel's request for a postponement of the hearing. Considering such circumstances, we follow the *Ensinger* rationale in resolving this matter.

at the time of hearing.⁴ In retracting the prior withdrawal, claimant's counsel did not provide an explanation for the initial decision to withdraw the hearing request or for the decision to disavow that withdrawal. Neither did claimant on Board review. Considering such circumstances, the record does not establish "extraordinary circumstances" beyond claimant's control to warrant a postponement of her hearing.

Although we concur with the ALJ's reasoning regarding the "postponement" issue, the remedy was not to *dismiss* the hearing request. Instead, consistent with the *Ensinger* rationale, the ALJ should have allowed the record to be developed based on the exhibits that the parties intended to present at the scheduled hearing. Additionally, because claimant failed to appear to the first hearing, she has waived her right to appear at a subsequent hearing. *See Randall E. Hug*, 45 Van Natta 1802 (1993); *Anthony B. Beardslee*, 42 Van Natta 965 (1990); *Denette D. Dale*, 41 Van Natta 2179 (1989)).

Accordingly, we vacate the ALJ's order and remand this case to ALJ Black for further proceedings. These proceedings may be conducted in any manner that the ALJ deems achieves substantial justice. The ALJ will determine what exhibits should be received, but no exhibits shall be received that were not prepared for submission as evidence at the prior hearing, nor shall any witness, including claimant, be permitted to testify who was not prepared to testify at the prior hearing. Thereafter, the ALJ shall issue a final, appealable order.

ORDER

The ALJ's order dated May 7, 2002 is vacated. Claimant's hearing request is reinstated. This matter is remanded to ALJ Black for further proceedings consistent with this order. These proceedings may be conducted in any manner that the ALJ deems achieves substantial justice.

Entered at Salem, Oregon on February 5, 2003

⁴ There is no indication that claimant's attorney lacked authority to withdraw the request for hearing on claimant's behalf. *See Donald J. Murray*, 50 Van Natta 1132 (1998). If claimant disagrees with the actions taken by her attorney, that is a matter to be resolved between them, not this forum.

Board Member Langer dissenting.

I disagree with the majority's conclusion that the ALJ lacked authority to dismiss claimant's request for hearing and its conclusion that claimant is entitled to further proceedings. Accordingly, I respectfully dissent.

The majority assumes that the ALJ's authority to dismiss a request for hearing is limited to circumstances described in OAR 438-006-0071 (abandonment of request for hearing through failure to appear or unjustified delay of more than 60 days). The majority concludes that the ALJ lacked authority to dismiss claimant's hearing request because, although claimant personally did not appear at the originally scheduled hearing, she appeared through counsel. The majority then goes on to conclude that claimant is entitled to a functional equivalent of a remedy provided in *Richard Ensinger*, 51 Van Natta 956 (1999).

In advancing the *Ensinger* rationale, the majority fails to recognize significant differences between this cases and *Ensinger*. There, the claimant failed to appear at a hearing. His attorney, who did appear on the claimant's behalf, moved for postponement. The insurer moved for dismissal. The ALJ dismissed the matter, having concluded that claimant had abandoned it. 51 Van Natta at 956. We reversed. We reasoned that, because the claimant appeared through his counsel, he did not abandon his request for hearing and the ALJ was not authorized to dismiss the matter. *Id.* In contrast, here, the attorney who appeared on claimant's behalf *withdrew* the request for hearing. The attorney did not request postponement.⁵ Accordingly, the *Ensinger* remedy is not available to claimant.

The majority further concludes that, although the record does not establish any grounds that would warrant postponement of the hearing, the remedy was not to dismiss the hearing request. As the ALJ's Order of Dismissal states claimant never requested continuance or postponement. She merely retracted her withdrawal of the request for hearing and requested that it be reinstated. Nevertheless, she did not provide any justification for reinstatement.

Neither statutes nor administrative rules provide for any procedure or remedy regarding reinstatement of a previously withdrawn request for hearing. Pursuant to ORS 656.283(7), the ALJ is not bound by formal rules of procedure

⁵ As the majority notes, nothing in the record suggests that the attorney lacked authority to withdraw the request for hearing on claimant's behalf.

and may conduct the hearing in any manner that will achieve substantial justice. Substantial justice is the overriding principle in workers' compensation proceedings. OAR 438-005-0035. Because no formal statutory or administrative provisions prohibit dismissal of a hearing request under the circumstances of this case, and because I am persuaded that the ALJ's decision to dismiss the matter was aimed at achieving substantial justice and well within the ALJ's discretion, I would affirm the order of dismissal.

Alternatively, even if dismissal were not an available remedy, I would still conclude that remand to the ALJ is not appropriate. Generally, the Board remands cases for consideration of motions for postponement or continuances where the parties filed motions after the issuance of dismissal orders and administrative law judges did not have an opportunity to rule on motions. *E.g., Olga G. Semeniuk*, 46 Van Natta 152 (1994). The exception is when the motion to postpone contains no explanation concerning the claimant's failure to appear. *E.g., James C. Crook, Sr.*, 49 Van Natta 65 (1997). Even though here, the basis for a request for postponement is not claimant's failure to appear at the hearing but her retraction of the withdrawal of the request for hearing, claimant provides no explanation for her actions. In addition, the ALJ already had addressed the request for reinstatement and found it not justified. Accordingly, I find it unnecessary to remand the case to the ALJ. I would deny claimant any relief.