



In the Matter of:

CRAIG TUCKER,

ARB CASE NO. 02-005

COMPLAINANT,

ARB CASE NO. 2001-STA-53

v.

DATE: March 15, 2002

CONNECTICUT WINPUMP COMPANY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD^{1/}

FINAL DECISION AND ORDER

Craig Tucker filed a complaint alleging that the respondent, Connecticut Winpump Company (CWC), retaliated against him for raising safety complaints, in violation of the employee protection provisions of the Surface Transportation Assistance Act (STAA) of 1982, as amended and recodified, 49 U.S.C. §31105 (1994). A Department of Labor Administrative Law Judge (ALJ) issued an order recommending that the complaint be dismissed. Pursuant to 29 C.F.R. §1978.109(a), the ALJ forwarded the case to the Administrative Review Board (Board) for review and to issue a final decision and order.

BACKGROUND

Pursuant to Tucker's request, the ALJ scheduled a hearing in this matter for August 22, 2001. On August 20, 2001, Tucker moved for a continuance stating that he was incapacitated by a back injury. CWC concurred in the motion for continuance, and the ALJ granted the motion and rescheduled the hearing for September 27, 2001, in New London, Connecticut.

Tucker neither appeared at the hearing on September 27, 2001, nor did he notify the ALJ of his inability to appear. When the ALJ's clerk attempted to contact Tucker, the clerk was informed by the person who answered the telephone that Tucker was not at home and would not be attending the hearing because he was suffering from bronchitis. Based on this information, CWC moved to dismiss the complaint on the grounds that Tucker had failed to attend the hearing and to prosecute his complaint.

^{1/} This appeal has been assigned to a panel of two Board members, as authorized by Secretary's Order 2-96. 61 Fed. Reg. 19,978 §5 (May 3, 1996).

In response to CWC's motion, the ALJ issued an order to show cause, giving Tucker ten days to explain his failure to appear at the hearing. Tucker did not respond to the ALJ's order. Finding that the record "fails to disclose circumstances explaining or excusing the Complainant's failure to appear at the hearing," the ALJ issued an order on October 24, 2001, recommending dismissal of Tucker's complaint "on the grounds of abandonment," and forwarded the case to the Board for review.

On October 29, 2001, the ARB issued a "Notice of Review and Briefing Schedule" informing the parties that the ALJ had forwarded the case for review and that the parties were permitted to file a brief in support of or in opposition to the ALJ's Recommended Order of Dismissal (R. O. D.) within thirty days of the date on which the ALJ issued the Order (November 23, 2001).

Neither Tucker nor CWC filed a brief with the Board by November 23, 2001. On January 2, 2001, the Board received a letter from Tucker, postmarked December 8, 2001, in which Tucker requested "a 60 to 90 day continuance due to spinal injuries received on 8/17/01." Tucker also noted that his doctor allows him to drive for only 15-20 minutes and therefore because he can not drive to New London, Connecticut at an early hour, "a change to a closer hearing site would be greatly appreciated and may be medically necessary."

Although Tucker indicates in his request for an enlargement of time that he is requesting additional time because of spinal injuries he received in August, 2001, he did not specify how these injuries precluded him from filing a brief by November 23, 2001.

Accordingly, because Tucker failed to file a timely brief, the Board ordered Tucker to show cause why the Board should not deny his motion for an enlargement of time, by filing a statement with the Board specifically demonstrating why he could not timely file his brief. The Board further ordered that Tucker's statement must be filed with the Board no later than 15 days following the date on which the order was issued, February 15, 2002. Finally, the Board cautioned Tucker that if he failed to file a timely response to this order, the Board would deny his motion for enlargement. Tucker has filed no response to the Board's Show Cause Order.

STANDARD OF REVIEW

Under the STAA, the Board is bound by the ALJ's factual findings if those findings are supported by substantial evidence on the record considered as a whole. 29 C.F.R. §1978.109(c)(3); *BSP Transp., Inc. v. United States Dep't of Labor*, 160 F.3d 38, 46 (1st Cir. 1998); *Castle Coal & Oil Co., Inc. v. Reich*, 55 F.3d 41, 44 (2d Cir. 1995). Substantial evidence is that which is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Clean Harbors Env'tl. Servs. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

In reviewing the ALJ's conclusions of law, the Board, as the Secretary's designee, acts with "all the powers [the Secretary] would have in making the initial decision . . ." 5 U.S.C. §557(b) (1994). See also 29 C.F.R. §1978.109(b). Therefore, the Board reviews the ALJ's conclusions of law *de novo*. *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

DISCUSSION

A. Tucker's request for an enlargement of time to file his brief

The regulations governing the filing of briefs with the Board in cases arising under the STAA provide:

The parties may file with the Administrative Review Board, . . . briefs in support of or in opposition to the administrative law judge's decision and order within thirty days of the issuance of that decision unless the Administrative Review Board, . . . upon notice to the parties, establishes a different briefing schedule.

29 C.F.R. §1978(c)(2). This regulation is an internal procedural rule adopted to expedite the administrative resolution of complaints arising under the STAA. 29 C.F.R. §1978.100. *See Gutierrez v. Regents of the University of California*, ALJ No. 98-ERA-19, ARB No. 99-116, Order Accepting Petition for Review and Establishing Briefing Schedule, slip op. at 3 (ARB Nov. 8, 1999)(case arising under environmental whistleblower provision). Because this procedural regulation does not confer important procedural benefits upon individuals or other third parties outside the agency, it is within the ARB's discretion, under the proper circumstances, to accept an untimely filed brief. *See Gutierrez v. Regents of the University of California, supra; Duncan v. Sacramento Metropolitan Air Quality Management District*, ARB No. 99-011, ALJ No. 97-CAA-12, Order Accepting Appeal and Establishing Briefing Schedule (ARB Sept. 1, 1999). *Accord American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 539 (1970). *Cf. City of Fredericksburg v. Federal Energy Regulatory Commission*, 876 F.2d 1109 (4th Cir. 1989)(FERC could not waive compliance with regulation requiring that water quality certification requests be made in compliance with state law because the regulation clearly is designed to confer a benefit upon the states by discouraging prospective licensees from thwarting state administrative procedures.).

Accordingly, when Tucker failed to file a timely brief and did not mail his request for an enlargement of time until two weeks after his brief was due, the Board ordered Tucker to explain why he was unable to comply with the briefing schedule, so that the Board could determine whether to grant Tucker's motion to file his brief, even though the time for filing his brief had expired. The Board also cautioned Tucker that if he failed to respond, "the Board will deny his motion for enlargement." Order to Show Cause at 2.

Tucker failed to respond to the Board's Show Cause Order. Consequently, in accordance with the Show Cause Order, Tucker's motion for enlargement is **DENIED**.

B. Review of the ALJ's Recommended Decision and Order

The regulations governing the procedure for issuing final administrative decisions under the STAA provide, "[t]he [ALJ's recommended] decision shall be forwarded immediately, together with the record, to the Secretary for review by the Secretary or his or her designee," 29 C.F.R.

§1978.109(a), and “the Administrative Review Board, . . . shall issue a final decision and order based on the record and the decision and order of the administrative law judge.” 29 C.F.R. §1978.109(c). The regulations also state that the parties “may” file briefs in support of or in opposition to the ALJ’s recommended decision with the Board within thirty days of the date upon which the ALJ issued the decision. Thus, even if the parties choose not to file briefs in opposition to or in support of the ALJ’s decision, or, as in this case, do not file timely briefs, the Board will review the record and issue the final administrative decision based on the record and the ALJ’s recommended decision as provided in 29 C.F.R. §1978.109. *Accord Mitchell v. Link Trucking, Inc.*, ARB No. 01-059, ALJ No. 2000-STA-39 (ARB Sept. 28, 2001); *Journey v. Barry Smith Transportation*, ARB No. 01-046, ALJ No. 2001-STA-3 (ARB June 25, 2001).

C. Tucker abandoned his appeal when he failed to attend the scheduled hearing.

The ALJ recommended that Tucker’s complaint be dismissed on the grounds that Tucker abandoned his case when he failed, without explanation, to attend a scheduled hearing. R. O. D. at 2. We accept the ALJ’s recommendation.

Courts possess the "inherent power" to dismiss a case on their own initiative for lack of prosecution. *Link v. Wabash Railroad Co.*, 370 U.S. 626, 630 (1962). This power is "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Id.* at 630-631. Like the courts, the Department of Labor's Administrative Law Judges and this Board must necessarily manage their dockets in an effort to "achieve the orderly and expeditious disposition of cases." Thus, the Board will affirm an ALJ's Recommended Order of Dismissal on the grounds of abandonment, where the facts dictate that a party has failed to prosecute his or her case. *Smith v. Lyondell-Citgo RefiningLP*, ARB No. 01-012, ALJ No. 2000-CAA-8 (ARB June 27, 2001); *Mastriana v. Notheast Utilities Corp.*, ARB No. 99-012, ALJ No. 98-ERA-33 (ARB Sept. 13, 2000).

In this case, the ALJ's conclusion that Tucker has abandoned his case is supported by substantial evidence in the record. After the hearing was rescheduled to accommodate Tucker, Tucker failed to attend the hearing or even to notify CWC and the ALJ that he did not intend to appear. He also failed to respond to the ALJ's order to show cause why his case should not be dismissed because of his failure to attend the hearing.

When the ALJ forwarded the case to the Board for review, Tucker again had the opportunity to explain why the ALJ’s finding that he had abandoned his complaint was incorrect. Tucker failed to respond. Accordingly, the record fails to disclose circumstances explaining or excusing Tucker’s failure to attend the hearing or to respond to the ALJ's order to show cause why the case should not be dismissed.

Although Tucker is appearing *pro se*, there is no indication in the record that his failure to respond to the ALJ's orders scheduling the hearing and to show cause and to the Board's briefing schedule is due to lack of legal training. The deadlines the ALJ and the Board set were readily comprehensible. *Cf. Jourdan v. Jabe*, 951 F.2d 108, 110 (6th Cir. 1991)(although it is preferable that a claim be adjudicated on its merits, if a *pro se* party has engaged in a clear pattern of delay,

dismissal is proper). Accordingly, the Board adopts the ALJ's Recommended Order of Dismissal, and the complaint is hereby **DISMISSED**.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge