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In the Matter of the Compensation of  
**EARL W. MYERS, Claimant**  
WCB Case No. 99-03688  
ORDER ON REVIEW  
Swanson Et Al, Claimant Attorneys  
Julie Masters, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Langer and Phillips Polich.

The SAIF Corporation requests review of Administrative Law Judge (ALJ) Herman's order that: (1) found that claimant's injury claim was not time-barred; and (2) set aside SAIF's denial of claimant's claim for a left foot injury. SAIF also contends that the ALJ erred in vacating an earlier order dismissing claimant's hearing request. On review, the issues are the ALJ's procedural rulings, timeliness, and potentially, compensability.

We adopt and affirm the ALJ's order with the following supplementation regarding the ALJ's procedural rulings and the compensability issue.

On October 10, 2000, the ALJ issued an "Order to Show Cause" giving claimant 15 days to show why the hearing request should not be dismissed due to an unjustified delay in the hearing of more than 60 days pursuant to OAR 438-006-0071. No response was received from claimant to the show cause order and an order dismissing claimant's hearing request issued on January 8, 2001.

Claimant, through his attorney, moved for reconsideration of the ALJ's dismissal order on January 18, 2001. The ALJ issued an order abating the Order of Dismissal on January 22, 2001. SAIF sought reinstatement of the dismissal order. Claimant filed a motion to set aside the dismissal order and included affidavits from claimant's attorney and claimant's attorney's legal assistant. On May 1, 2001, the ALJ issued an order vacating the order of dismissal, concluding that claimant's failure to file a timely response to the "Order to Show Cause" constituted excusable neglect.

On Board review, SAIF contends that that the ALJ abused her discretion by vacating the dismissal order and reinstating claimant's hearing request. SAIF asserts that the ALJ applied an incorrect legal standard in setting aside the dismissal order. We disagree.

Pursuant to ORS 656.283(7), an ALJ is not bound by technical or formal rules of procedure, and may conduct a hearing in any manner that will achieve substantial justice. Here, the ALJ dismissed claimant's hearing request based on OAR 438-006-0071(1). That rule provides: "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."

Under the rule, the relevant issues are whether the hearing request has been abandoned or whether there has been an "unjustified delay" in the hearing of more than 60 days. SAIF contends, however, that the delay must be justified by "extraordinary circumstances." SAIF relies on OAR 438-006-0071(2). That rule provides:

"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."

This case, however, does not involve a failure to attend a rescheduled hearing by a party or party's representative. Thus, subsection (2) of the rule is not applicable. Subsection (1), the applicable subsection, provides the ALJ with the discretion to dismiss a hearing based on the ALJ's determination of whether the hearing has been abandoned by the party requesting it or where the requesting party has engaged in conduct that has resulted in an "unjustified delay" of more than 60 days. *See SAIF v. Kurcin*, 334 Or 399 (July 25, 2002) (because Board's continuance rule stated that an ALJ "may" continue a hearing for further proceedings, Board's standard of review of ALJ's continuance ruling was for an abuse of discretion).

Here, after considering claimant's motion to set aside the dismissal order, the ALJ found that claimant's failure to respond to the show cause order was "excusable neglect" and reinstated the hearing request. Based on this finding, we are persuaded that ALJ concluded that the hearing had not been abandoned and that there was no "unjustified delay" warranting dismissal under OAR 438-006-0071(1). Because the record would support such a finding, we are unable to conclude that the ALJ abused her discretion by reinstating the

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hearing request. *See SAIF v. Kurcin*, 334 Or 399 (July 25, 2002) (when record supports an ALJ's decision either to grant or deny a continuance, Board must conclude that the ALJ's choice is not an abuse of discretion).

Regarding the merits, SAIF contends that ORS 656.005(7)(a) requires a compensable injury to be established by medical evidence supported by objective findings. Because medical records from claimant's 1965 injury no longer exist, SAIF contends that there is no medical evidence in the record that establishes that the 1965 injury occurred. We disagree.

The record contains medical records from 1973 that refer to an "old injury" to claimant's foot. (Ex. A). These records include a 1973 operative report from Dr. Harder that indicates that he observed that a fracture of the left foot had previously been present. (Ex. C). Based on claimant's testimony regarding his left foot injury, as well as Mr. Thompson's stipulated testimony regarding the 1965 injury and the 1973 medical evidence, we find that it is reasonable to infer that the old fracture discussed in the 1973 medical records represents the 1965 injury. Based on this evidence, we draw the reasonable inference that the 1965 injury occurred and we find that the 1973 reports constitute medical evidence, supported by objective findings, of the 1965 left foot injury. Accordingly, we conclude that the ALJ's order should be affirmed.

Claimant is not entitled to an attorney fee on Board review, because no brief was submitted. *Shirley M. Brown*, 40 Van Natta 879 (1988).

#### ORDER

The ALJ's order dated August 10, 2001 is affirmed.

Entered at Salem, Oregon on August 14, 2002