
In the Matter of the Compensation of
EZEQUIEL L. RAMIREZ, Claimant
WCB Case No. 00-08283
ORDER ON REVIEW
Claimant Unrepresented
Terrall & Terrall, Defense Attorneys

Reviewing Panel: Members Phillips Polich and Lowell.

Claimant, *pro se*, requests review of Administrative Law Judge (ALJ) Hazelett's order that dismissed claimant's request for hearing pursuant to OAR 438-006-0071(2).¹ On review, the issue is the propriety of the ALJ's dismissal order.

We adopt and affirm the ALJ's order, with the following supplementation.²

Claimant filed a request for hearing on November 3, 2000. A hearing was scheduled for 9 a.m. on July 12, 2001. Because claimant had received a notice erroneously informing him that an interpreter would be available to assist him at 1:30 p.m. on the same date, claimant's failure to attend the 9 a.m. proceeding was excused. Through an interpreter on July 12, 2001, claimant was advised to seek the assistance of an attorney and his address was verified. The matter was then reset for hearing on August 28, 2001. Neither claimant nor his representative appeared for the rescheduled hearing.

The ALJ issued an "Order to Show Cause," granting claimant 15 days to show cause for his failure to appear at the scheduled hearing. When claimant did not respond, the ALJ dismissed the request for hearing. Claimant requested Board review.

OAR 438-006-0071(2) provides:

¹ The ALJ's order contains a clerical error in that it refers to OAR 438-007-0071(2).

² Inasmuch as claimant is unrepresented, he may wish to contact the Workers' Compensation Ombudsman, whose job it is to assist injured workers regarding workers' compensation matters. He may contact the Workers' Compensation Ombudsman toll-free at 1-800-927-1271 or write to:

Workers' Compensation Ombudsman,
Dept. of Consumer & Business Services,
350 Winter St. NE,
Salem, OR 97301-3878

“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.”

In this case, claimant did not respond to the ALJ’s “show cause” order, thus failing to timely advise the ALJ of “extraordinary circumstances” justifying postponement or continuance of the hearing. Claimant has now responded, “post dismissal” indicating simply that his failure to appear at the hearing was “due to a miscommunication on the time of the hearing.”

Our review must be based on the record certified to us. *See* ORS 656.295(5). Consequently, we treat claimant’s belated response as a motion to remand to the ALJ for the taking of additional evidence. *See Tsegaye Addisu*, 53 Van Natta 792 (2001); *Robert A. Wilson*, 52 Van Natta 2225 (2001); *Tamara J. Fleshman*, 52 Van Natta 1918 (2001).

We may remand to the ALJ if the record has been improperly, incompletely or otherwise insufficiently developed. ORS 656.295(5). Remand is appropriate on a showing of good cause or other compelling basis. *See Kienow’s Food Stores v. Lyster*, 79 Or App 416 (1986). To merit remand for consideration of additional evidence, however, claimant must demonstrate that material evidence was not obtainable with due diligence at the time of the hearing and that the evidence is reasonably likely to affect the outcome of the case. *Compton v. Weyerhaeuser Co.*, 301 Or 641, 646 (1986); *Metro Machinery Rigging v. Tallent*, 94 Or App 245, 249 (1988).

Here, claimant gives no reason why he could not have provided his explanation for failure to attend the hearing in response to the “show cause” order. Specifically, claimant does not explain why he did not submit information concerning the “miscommunication on the time of the hearing” within the 15 days granted in the “show cause” order. Moreover, even if claimant’s explanation had been considered, it is not likely to affect the result of this case.

Under these circumstances, we conclude that the case has not been improperly, incompletely, or otherwise insufficiently developed. Accordingly,

it does not merit remand.³ Considering claimant's failure to timely respond to the ALJ's "show cause" order, we further conclude that the ALJ properly dismissed claimant's request for hearing. See *Michael L. Singleton*, 53 Van Natta 24 (2001).

ORDER

The ALJ's order dated October 2, 2001 is affirmed.

Entered at Salem, Oregon on May 22, 2002

³ In reaching this conclusion, we distinguish those cases in which we have remanded to an ALJ for consideration of a claimant's response to a "show cause" order. See *Dirk K. Carney*, 53 Van Natta 1525 (2001); *Michael E. Davis*, 53 Van Natta 1059 (2001); *Teresa Marion*, 50 Van Natta 1165 (1998); *Brent Harper*, 50 Van Natta 499 (1998). In each of those cases, the claimant timely responded to the "show cause" order, but the ALJ did not have time to consider or was never notified of the claimant's timely response. In each instance, we found a compelling reason to remand for the ALJ's consideration of the claimant's timely filed response. Here, claimant failed to submit a timely response to the ALJ's "show cause" order.