
In the Matter of the Compensation of
HEIDI PHARES, Claimant
WCB Case No. 09-06789
ORDER ON REVIEW
Guinn & Munns, Claimant Attorneys
MacColl Busch Sato PC, Defense Attorneys

Reviewing Panel: Members Biehl and Lowell.

Claimant requests review of Administrative Law Judge (ALJ) Pardington's order that: (1) found that claimant had not established extraordinary circumstances beyond her control for failing to appear at the scheduled hearing; and (2) dismissed claimant's hearing request based on an unjustified failure to appear. With her brief, claimant's submits a document that was not submitted at hearing. We treat claimant's submission as a motion to remand. *Judy A. Britton*, 37 Van Natta 1262 (1985). On review, the issues are remand and the propriety of the ALJ's dismissal order.

We deny the motion to remand and adopt and affirm the ALJ's order with the following supplementation.

Claimant requested a hearing on December 1, 2009. After two postponements, a hearing was scheduled for October 11, 2010. A hearing convened on that date, but claimant did not appear, nor was she represented by counsel.

Reached by telephone, claimant's attorney made a motion for postponement which was denied. The employer moved to dismiss claimant's request for hearing.

On October 13, 2010, the ALJ issued an order dismissing claimant's request for hearing, finding that she had waived an appearance. The order also provided that claimant could request reconsideration within 15 days and, if she could show extraordinary circumstances for the failure to appear at hearing, the order would be set aside.

Claimant did not respond within the "15 day" opportunity provided by the ALJ's order to "show cause" for not appearing at the hearing. Thus, she did not timely provide "extraordinary circumstances" that would justify postponement or continuance of the hearing. Instead, claimant has now responded on review of the ALJ's order, submitting an affidavit regarding her failure to appear at the hearing.¹

¹ We consider claimant's submission only for the purpose of determining whether remand is warranted. Under such circumstances, we need not address the employer's motion to "strike" submission.

However, our review must be based on the record certified to us. *See* ORS 656.295(5). Consequently, we treat claimant's response as a motion to remand to the ALJ for the taking of additional evidence. *See Ezequiel L. Ramirez*, 54 Van Natta 479, 480 (2002) ("post-dismissal" response to a "show cause" order interpreted as a motion to remand to the ALJ).

We may remand to the ALJ if we find that the case has been "improperly, incompletely or otherwise insufficiently developed." ORS 656.295(5). There must be a compelling reason for remand to the ALJ for the taking of additional evidence. *SAIF v. Avery*, 167 Or App 327, 333 (2000). A compelling reason exists when the new evidence: (1) concerns disability; (2) was not obtainable with due diligence at the time of the hearing; and (3) is reasonably likely to affect the outcome of the case. *Id.*; *see Compton v. Weyerhaeuser Co.*, 301 Or 641, 646 (1986).

Here, claimant provided no explanation why her affidavit submitted on review was not timely provided to the ALJ as mandated in the order; *i.e.*, within 15 days of the order. Under these circumstances, claimant has not established that the proposed evidence was unobtainable with due diligence and there is no compelling reason to remand. Consequently, we deny claimant's motion for remand. *See Joseph M. Deprizio*, 60 Van Natta 488 (2008).

Finally, considering claimant's failure to timely "show cause" for failing to appear at the scheduled hearing, we further conclude that the ALJ properly dismissed her request for hearing under OAR 438-006-0071(2). *See Jaime V. Galindo*, 59 Van Natta 2121, 2123 (2007); *Tsegaye Addisu*, 53 Van Natta 792, 793 (2001) (approving dismissal of hearing request where the claimant failed to timely respond to ALJ's show-cause order); *Lawrence E. Gerads*, 53 Van Natta 1650 (2001) (same); *Michael L. Singleton*, 53 Van Natta 24 (2001) (same).

ORDER

The ALJ's order dated October 13, 2010 is affirmed.

Entered at Salem, Oregon on May 12, 2011