

In the Matter of the Compensation of
LANA CHANEY-HARMON, Claimant
WCB Case No. 13-06076
ORDER ON REVIEW

Welch Bruun & Green, Claimant Attorneys
Lyons Lederer LLP, Defense Attorneys

Reviewing Panel: Members Lanning and Lowell.

Claimant requests review of Administrative Law Judge (ALJ) Kekauoha's order that dismissed "with prejudice" her request for hearing regarding the self-insured employer's denial of her occupational disease claim for bilateral shoulder conditions. The employer moves for sanctions under ORS 656.390, contending that claimant's appeal is frivolous. On review, the issues are the propriety of the ALJ's dismissal and sanctions.

We deny the employer's motion for sanctions and adopt and affirm the ALJ's order with the following supplementation.

On August 30, 2012, the employer denied claimant's occupational disease claim for bilateral shoulder conditions. On September 13, 2012, through her former attorney, claimant requested a hearing. A hearing was set before a prior ALJ.

On June 4, 2013, claimant's former counsel withdrew the request for hearing, stating that the "medical evidence does not support claimant's position." Thereafter, the employer moved to dismiss the matter with prejudice.

On June 14, 2013, the prior ALJ issued an Order of Dismissal, dismissing the September 13 request for hearing with prejudice. Claimant then moved for reconsideration, requesting that her hearing request be dismissed "without prejudice." The employer objected. On July 17, 2013, after abating the initial order, the prior ALJ issued an Order of Dismissal on Reconsideration, dismissing the request "without prejudice." In doing so, the prior ALJ relied on *Michael R. Dunham*, 63 Van Natta 1627 (2011), wherein the Board indicated that, absent agreement from the parties, requests for review are dismissed "without prejudice." That order became final.

On September 16, 2013, claimant, via her current counsel, requested that "the original request for hearing in this matter be assigned a new hearing date

in the regular course.” On October 17, 2013, the prior ALJ denied that request, explaining that the July 2013 dismissal order had become final by operation of law.

On December 6, 2013, claimant filed a new request for hearing, again challenging the August 30, 2012 denial. A hearing was set before the current ALJ.

On December 16, 2013, the employer moved to dismiss the December 6 hearing request as untimely. On January 3, 2014, claimant withdrew her December 6 request for hearing. That same day, the employer requested that the ALJ dismiss the request with prejudice.

On January 9, 2014, claimant objected to the employer’s motion, requesting that the matter be dismissed without prejudice. Claimant relied on *Dunham* for the proposition that because there was no agreement between the parties, the hearing request should be dismissed without prejudice.

Thereafter, the ALJ issued an Order of Dismissal, dismissing claimant’s request for hearing with prejudice. The ALJ distinguished *Dunham*, reasoning that it addressed a dismissal of a request for Board review, and not a request for hearing. Claimant requested Board review, but did not identify the reason for requesting review. Nor did she file an appellant’s brief.

For the following reasons, we find that the ALJ did not abuse his discretion in dismissing claimant’s December 6, 2013 request for hearing with prejudice.

When the party requesting a hearing moves for dismissal, and there is no cross-request for hearing, the ALJ has discretion to set the terms and conditions of a dismissal order as deemed appropriate. *See Adrian U. Botello*, 54 Van Natta 941, 943 (2002); *Julie Mayfield*, 42 Van Natta 871, 872 (1990). We will not disturb the terms and conditions imposed by the ALJ, absent an abuse of discretion. *See Botello*, 54 Van Natta at 943; *Ronald D. Robinson*, 44 Van Natta 2500, 2501 (1992); *Mayfield*, 42 Van Natta at 872. In *Robinson*, we held that, when an objection is raised to a dismissal without prejudice, it is incumbent on the party who requested the hearing to provide an explanation for the withdrawal. 44 Van Natta at 2502.

Here, the ALJ acknowledged claimant’s explanation for requesting the dismissal without prejudice, which was that she wished to preserve her rights to request a hearing in the future based on the underlying facts that gave rise to the dispute. However, the ALJ did not find this explanation sufficient. The ALJ

explained that, because claimant's "60-180 day" appeal rights¹ on the employer's August 30, 2012 denial had long since expired (and in fact had already expired when she filed her December 6 hearing request), a dismissal "without prejudice" would not preserve any rights to request a hearing involving the same factual transaction that gave rise to the denial. The ALJ also found *Dunham* distinguishable on the basis that it concerned a Board decision dismissing a request for review and did not address a request for hearing.

After reviewing the record, we find no abuse of discretion. First, we agree with the ALJ's reasoning that the benefit of a dismissal "without prejudice" in this matter is not readily apparent given that the denial has already become final by operation of law (*i.e.*, the statutory appeal period for the August 2012 denial (60 days, or 180 days for "good cause") had expired before the December 2013 hearing request was made). *See* ORS 656.319; *Dunham*, 63 Van Natta at 1627 n 1 (noting that the practical difference between a Board order dismissing the request for review of an ALJ's order "with" or "without" prejudice was not discernible once the statutory appeal period for appealing the Board's dismissal order had expired); *David H. McKinley*, 52 Van Natta 890 (2000) (although prior hearing request was dismissed without prejudice, the claimant was barred from relitigating the denial because it had become final by operation of law); *Ralph B. DePaul*, 44 Van Natta 92 (1992) (the "reservation" of issues raised by a request for hearing amounts to a dismissal of those issues without prejudice; those issues can then be raised again as long as a new hearing is requested within the time limits set forth in ORS 656.319). We also find the ALJ's analysis of *Dunham* to be supportable.

Accordingly, we find no abuse of discretion in the ALJ's decision to dismiss claimant hearing request with prejudice.

We turn to the employer's request for sanctions against claimant for a frivolous request for review. For the following reasons, we do not consider sanctions to be warranted.

If a party requests Board review of an ALJ's order and the Board finds that the appeal was frivolous or filed in bad faith or for the purpose of harassment, the Board may impose an appropriate sanction upon the attorney who filed the request for review. ORS 656.390(1). "Frivolous" means that the matter is not supported by substantial evidence or is initiated without a reasonable prospect

¹ *See* ORS 656.319(1).

of prevailing. ORS 656.390(2). That standard requires us to ask whether the argument “is one * * * that a reasonable lawyer would know is not warranted either by existing law or by a reasonable argument for the extension, modification, or reversal of existing law.” See *Westfall v. Rust Int’l*, 314 Or 553, 559 (1992). Moreover, the statutory authorization for the imposition of sanctions is confined to a frivolous “request for review,” rather than a frivolous argument on review. See *Arlene J. Bond*, 50 Van Natta 2426, 2427 (1998).

Although the current ALJ found *Dunham* distinguishable, that case was relied on by the prior ALJ in support of an earlier dismissal “without prejudice.” In deciding to dismiss claimant’s earlier hearing request “without prejudice,” the prior ALJ cited *Dunham*, noting that the Board had indicated that, absent agreement from the parties, requests for review were dismissed “without prejudice.” The prior ALJ then concluded that “given the dispute between the parties,” a dismissal “without prejudice” was appropriate.

The current ALJ interpreted the *Dunham* holding differently. Specifically, the current ALJ reasoned that *Dunham* concerned the dismissal of a request for Board review of an ALJ’s order, whereas the present case involved the dismissal of a hearing request (which was from a claim denial that was mailed about a year and a half before the dismissal).

Thus, this record demonstrates that two ALJs reached different conclusions regarding the *Dunham* holding as controlling authority at the hearing level. Given such circumstances, we find that claimant’s request for review raised a “colorable argument” that her hearing request should be dismissed “without prejudice” based on the rationale of *Dunham*.² See *Laura A. Fox*, 62 Van Natta 2419 (2010) (sanctions not awarded where the party that requested review presented colorable arguments that were sufficiently developed to create a reasonable prospect of prevailing); *Bond*, 50 Van Natta at 2427 (even though one issue is raised without reasonable prospect of prevailing, if one aspect of a request for review has a reasonable prospect of prevailing, the overall request for review was not frivolous).

² We acknowledge that claimant did not expressly present an argument on Board review. Nevertheless, the record indicates that she submitted an argument at the hearing level, asserting that the *Dunham* “dismissal without prejudice” rationale should be applied to the withdrawal of her hearing request. Because our review of the ALJ’s order and this record is *de novo*, we find that claimant’s “hearing level” argument constitutes a colorable argument for purposes of Board review. See ORS 656.295(6); *Thomas J. Hill*, 63 Van Natta 468 (2011) (consistent with ORS 656.295(6), where no briefs were filed by the claimant, we based our decision on a thorough *de novo* review of the appellate record, including the hearing transcript, admitted exhibits, and the ALJ’s order); *Mark D. Weigel*, 62 Van Natta 1404 (2010) (same).

Therefore, although claimant has not prevailed under the “*Dunham*” rationale (due to expiration of the time limits set forth in ORS 656.319), we do not consider her request for review to have been initiated without reasonable prospect of prevailing.³ Accordingly, we are not persuaded that claimant’s request for review warrants sanctions under ORS 656.390.

ORDER

The ALJ’s order dated January 30, 2014 is affirmed.

Entered at Salem, Oregon on May 9, 2014

³ In reaching this conclusion, we note that, until today’s decision, there has not been a Board decision regarding *Dunham*’s applicability to the dismissal of hearing requests. This further supports the proposition that claimant’s request for review was not frivolous.