
In the Matter of the Compensation of
MARIA S. CHIRITESCU, Claimant
WCB Case No. 16-02341
ORDER ON REVIEW
Unrepresented Claimant
Sather Byerly & Holloway, Defense Attorneys

Reviewing Panel: Members Curey and Ousey.

Claimant, *pro se*,¹ requests review of Administrative Law Judge (ALJ) Sencer's order that: (1) found that claimant had not established extraordinary circumstances to justify a third postponement of her scheduled hearing regarding the self-insured employer's denial of her injury claim for headache and vertigo conditions; and (2) dismissed claimant's hearing request for a failure to appear at the scheduled hearing. On review, the issues are postponement and dismissal.²

¹ Inasmuch as claimant is unrepresented, she may wish to consult the Ombudsman for Injured Workers. She may contact the Ombudsman for Injured Workers, free of charge, at 1-800-927-1271, or write to:

OMBUDSMAN FOR INJURED WORKERS
DEPT OF CONSUMER & BUSINESS SERVICES
PO BOX 14480
SALEM, OR 97309-0405

² With her request for review, claimant submitted a document that was not admitted as evidence at the hearing. Our review, however, must be based on the record certified to us. *See* ORS 656.295(5). Consequently, we treat claimant's submission as a motion to remand to the ALJ for the taking of additional evidence. *Judy A. Britton*, 37 Van Natta 1262 (1985). We consider the proposed evidence only for the purpose of determining whether remand is appropriate.

We may remand a case to the ALJ for further evidence taking only if we find that the case has been improperly, incompletely or otherwise insufficiently developed. *See* ORS 656.295(5); *Bailey v. SAIF*, 296 Or 41, 45 n 3 (1983). To warrant remand, the moving party must show good cause or a compelling basis. A compelling basis exists when the evidence: (1) concerns disability; (2) was not obtainable at the time of hearing; and (3) is reasonably likely to affect the outcome of the case. *See Compton v. Weyerhaeuser Co.*, 301 Or 641, 646 (1986); *Metro Machinery Rigging v. Tallent*, 94 Or App 245, 249 (1988).

In this case, there has been no showing that the proposed evidence was not obtainable at the time of the hearing. Moreover, we find that the submitted material would not be reasonably likely to affect the outcome of the case. Consequently, we find no compelling basis for remanding and we conclude that the case has not been improperly, incompletely, or otherwise insufficiently developed without the proposed evidence. Accordingly, remand is not warranted.

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

On May 17, 2016, claimant, who was unrepresented, requested a hearing concerning the employer's denial of her injury claim. Following two previous hearing postponements, a hearing convened on the morning of April 12, 2017. Claimant did not appear.

Based on claimant's nonappearance at the scheduled hearing, together with her failure to respond to previous letters from the ALJ and her lack of contact with the Hearings Division to request a postponement or explain why she was not going to appear, the employer moved to dismiss her request for hearing as abandoned pursuant to OAR 438-006-0071. The ALJ granted the employer's motion and explained that his dismissal order would advise claimant of her rights to request reconsideration if she could demonstrate extraordinary circumstances excusing her failure to appear. (Tr. 2).

During the afternoon of that same day (April 12, 2017), and before a dismissal order was issued, the ALJ received a letter from claimant wherein she requested a postponement, asserting that she was unable to attend the hearing due to her "deteriorating health." The letter added that claimant recently obtained a report from her chiropractor, Dr. Zielinski, and that she was presenting the report to other medical providers in an effort to obtain support for her claim. Claimant did not provide a copy of Dr. Zielinski's report with her letter.

On April 21, 2017, the ALJ issued an interim "show cause" order that directed claimant to file Dr. Zielinski's report and "any other reports she obtains," on or before May 15, 2017.³

On May 15, 2017, the ALJ received claimant's response to the interim order, which consisted of a written description of her symptoms and frustrations with her medical care and the "system" (including statements that she will "not give up," and will "fight until some changes happen"), two medical reports from Dr. Zielinski, and two internet articles.

On June 7, 2017, the ALJ issued an Order of Dismissal. After reviewing Dr. Zielinski's chart notes, the ALJ noted that none of claimant's findings had been related to her work exposure. The ALJ ultimately concluded that, based on the two

³ An ALJ retains jurisdiction over a matter unless and until a hearing request is dismissed via an ALJ's order. See *Rebecca J. Cartwright*, 55 Van Natta 434, 435, *recons*, 55 Van Natta 797, 799 (2003); *David J. Keller*, 49 Van Natta 697 (1997).

prior postponements, together with claimant's failure to attend the third hearing on April 12, 2017, claimant had not established extraordinary circumstances justifying a further postponement.

Claimant requested review. Her request did not address the postponement issue, but rather contended that her claimed condition was work related. For the following reasons, we affirm the ALJ's dismissal order.

Under OAR 438-006-0017(2), when a party requesting a hearing fails to appear, the ALJ shall dismiss the request for hearing as abandoned unless "extraordinary circumstances" justify postponement or continuance of the hearing. A postponement requires a finding of extraordinary circumstances beyond the control of the requesting party. OAR 438-006-0081. We review the ALJ's determination that there was insufficient evidence to establish "extraordinary circumstances" to justify the postponement of claimant's scheduled hearing *de novo*. See *Grinstead v. Lacamas Laboratories, Inc.*, 212 Or App 408, 413 (2007); *Cynthia Yerton*, 61 Van Natta 1581, 1585 (2009).

A party alleging "extraordinary circumstances" must have an opportunity to establish such circumstances for the purpose of justifying a nonappearance at a scheduled hearing. See *Brawley A. Loza*, 60 Van Natta 1286 (2008); *Carolyn J. Bean*, 59 Van Natta 187 (2007). Here, the ALJ allowed claimant that opportunity by virtue of his April 21, 2017 interim order. However, nowhere in that order did the ALJ inform claimant that she had to show "extraordinary circumstances" to justify her postponement request and that she was being given an opportunity to do so. Rather, the ALJ's order directed claimant to file the report from Dr. Zielinski and "any other reports she obtains" within the prescribed period.

Notwithstanding the narrow focus of the ALJ's interim order, there is no indication (either at hearing or on review) that claimant had another reason for not attending the hearing (*e.g.*, illness, transportation problem, confusion) other than the explanation that she presented for the ALJ's consideration. Therefore, based on this record, and in this particular situation, we agree with the ALJ's determination that claimant did not establish extraordinary circumstances justifying a postponement of her scheduled hearing. Accordingly, we affirm the ALJ's decision dismissing the request for hearing.

ORDER

The ALJ's order dated June 7, 2017 is affirmed.

Entered at Salem, Oregon on December 1, 2017