Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Meridian Nursing & Rehab at Shrewsbury
Docket No. A-13-21
Decision No. 2504
March 22, 2013

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Meridian Nursing & Rehab at Shrewsbury (Meridian) appeals the September 21, 2012 ruling of Administrative Law Judge (ALJ) Richard J. Smith declining to vacate his dismissal of Meridian's appeal before him on grounds of abandonment. Meridian argues that the ALJ erred in not reinstating its appeal, asserting that its repeated failures to meet deadlines were entirely caused by improper service of ALJ orders and other filings. After a careful review of the record below, we conclude that the ALJ acted within his discretion in dismissing Meridian's appeal. Furthermore, although we recognize (as did the ALJ) that dismissal is a severe sanction, we conclude that the circumstances here support the ALJ's refusal to vacate the dismissal based on the purported explanation ultimately offered by Meridian's counsel for its inaction.

Case Background

The ruling under appeal here was the end result of a series of events during the proceedings in this matter before the ALJ. It is therefore necessary to trace those events in some detail in order to evaluate that ruling.

By letter dated January 20, 2012, Meridian sought ALJ review of the determination of the Centers for Medicare & Medicaid Services (CMS) to impose civil money penalties (CMPs) of $3,150 for one day of noncompliance amounting to immediate jeopardy and $50 for one day of noncompliance at a lower level. The CMPs arose from a survey of Meridian's facility on October 5, 2011 which found that Meridian was not in substantial compliance with four regulatory requirements (at 42 C.F.R. §§ 483.25(h), 483.20(d), 483.20(k)(1), and 483.20(k)(3)(i)). The request for review was signed by Andrew P. Aronson of Gluck Walrath LLP.

On February 8, 2012, the ALJ issued an acknowledgment and initial docketing order (Initial Order). The Initial Order incorporated as applicable to the case the Civil Remedies Division Procedures (CRDP) enclosed with it and warned the terms of the Initial Order including CRDP were enforceable pursuant to section 1128A(c)(4) of the

Act. Section 1128A(c)(4) provides authority for the hearing official to impose sanctions, including dismissal.[1] The Initial Order stated that "[a]ll counsel assigned to this case must file a notice of entry of appearance" within 10 days and that counsel "must confer with each other" before filing motions for disposition and/or reports of readiness within 30 days of the date of the Initial Order. Initial Order at 2. The Initial Order was addressed to Andrew P. Aronson of Gluck Walrath, LLP and sent by both email and postal mail. Mr. Aaronson responded on the same day to the ALJ's staff attorney by email noting that Meridian was also seeking informal dispute resolution before the state survey agency.

On February 10, 2011, counsel for Meridian filed a notice of appearance which read in full as follows: "Please enter the appearance of Gluck Walrath LLP as attorneys for Petitioner Meridian Nursing & Rehabilitation Center at Shrewsbury in the above-captioned matter." The notice was signed "Gluck Walrath LLP by Andrew Bayer." On March 8, 2012, CMS filed a readiness report and a motion for partial summary disposition or alternatively to require a more definite hearing request. Counsel for CMS asserts in a declaration, and Meridian does not deny, that a week before the parties' filings were due, she spoke to Mr. Aronson to confer as required by the Initial Order. July 30, 2012 declaration by Judy Wong Strobos, attached to CMS Reply to Meridian's Motion to Vacate ALJ Dismissal Order. She declares that they discussed the need to file their submissions under the Initial Order and their respective positions on the issues and further declares that "[a]t no time during the conversation did Mr. Aronson state . . . that he was not the counsel of record, or that [she] should speak to Andrew Bayer about the case." *Id*. at 2.

On April 20, 2012 (almost six weeks after Meridian's initial submission was due), the ALJ issued an order to show cause (Show Cause Order I), recording that Meridian had neither filed its submission nor responded to CMS's timely-filed submission. There is no indication in the record, and Meridian has made no claim suggesting, that anyone from Gluck Walrath LLP sought to contact the ALJ's office from February 11 until after the issuance of Show Cause Order I. The ALJ questioned whether Meridian was abandoning its hearing request and gave Meridian until May 10, 2012 to show cause why the case should not be dismissed. Show Cause Order I at 1. Meridian was also ordered to file its overdue submission and its response to CMS's submission by the same date. The ALJ advised Meridian that he might dismiss the case for failure to comply with the Initial Order and for apparent abandonment unless Meridian timely filed the required documents. *Id*.

[1] The CRDP further advises parties that an ALJ "may sanction a person, including any party or attorney, for failing to comply with an order or procedure, for failing to defend an action, or for other misconduct that interferes with the speedy, orderly or fair conduct of the hearing." CRDP § 17.

On May 8, 2012, the ALJ's staff attorney received an email transmission from an individual who identified herself as "Secretary to Andrew Aronson," attaching three documents responsive to Show Cause Order I and stating that a hard copy of each would follow. The package of documents included a letter stating that "[t]his firm represents" Meridian in the present case and requesting that the ALJ "reconsider any possibility of dismissing . . . as we are now in full compliance." Letter from Gluck Walrath LLP dated May 8, 2012, at 1. The letter is signed by a Ryan M. Jones. Also included were a document responding to CMS's motions and a readiness report, each signed as submitted by "Andrew Aronson by Ryan M. Jones."

On May 15, 2012, the ALJ issued a ruling and order (Show Cause Order II) in which he found that Meridian's response to Show Cause Order I "makes no attempt to explain or justify its serious failure to comply with the Order of February 8" and that Meridian's conduct "has substantially impeded the speedy, orderly, and fair development of this case." Show Cause Order II at 2. The ALJ instructed Meridian to "demonstrate good cause for its noncompliance" with his orders by May 31, 2012 or face "immediate dismissal" of its action "without further notice or proceedings." *Id*. The ALJ also found that Meridian's response to CMS's motions was "unclear and virtually impossible to follow" and "in no sense adequate to meet the content requirements of 42 C.F.R. § 498.40(b)." *Id*. Nevertheless, in order to ensure Meridian had a full opportunity to appeal all the cited deficiencies, the ALJ permitted Meridian to file an amended hearing request by the same date addressing with specificity all allegations against it. *Id*. at 2-3. Show Cause Order II was addressed to Attorneys Aronson, Jones, and Bayer at Gluck Walrath, LLP.

When the date set in Show Cause Order II passed with no communication from Meridian, the ALJ ordered the case dismissed on June 12, 2012 (Dismissal). The Dismissal was addressed to the same three attorneys at the same firm.

On June 19, 2012, Mr. Jones filed a motion to vacate the dismissal, accompanied by resubmission of the package submitted on May 8, 2012. On June 22, 2012, Mr. Aronson notified the ALJ's staff attorney and CMS by email that Meridian would be filing an amended motion to vacate early in the week of June 25, 2012 (and asked CMS to hold off on any reply until the replacement motion was filed).

By letter dated July 9, 2012, Andrew Bayer submitted an amended motion and brief asking the ALJ to vacate the dismissal, accompanied by certifications from himself and Mr. Aronson. Meridian took the position that it "did not intentionally disobey" any of the ALJ's orders, but rather that neither the ALJ nor CMS properly served its counsel so that it was unaware of the events in the case. Meridian Br. in Support of Motion to Vacate at 1.

The attorneys' certifications explaining their actions can be summarized as follows: Mr. Aronson led the firm's healthcare department and represented Meridian up to the point of filing the hearing request but then "turned this file over" to Mr. Bayer as chair of the litigation department of the firm. Aronson Cert. at 2. Once Mr. Bayer filed a notice of appearance in the matter, Mr. Aronson considered himself no longer counsel of record and, although he admittedly continued to receive the documents from the ALJ, he "believed that they were courtesy copies" and assumed (without discussing it with him) that Mr. Bayer got copies too because "Mr. Bayer was listed as an addressee." *Id*. Mr. Aronson states that, in the last week of April, he noticed that he had received Show Cause Order I and talked to Mr. Bayer who told him he had not received or been aware of it. *Id.* at 3; Bayer Cert. at 2. Mr. Bayer had another attorney at the firm (Mr. Jones) prepare and file Meridian's response to Show Cause Order I. *Id*. Mr. Jones "found [CMS's] motion in Mr. Aronson's file" and responded to that. Bayer Cert. at 2. Both Mr. Aronson and Mr. Bayer deny that they "heard anything further" about the case until June 18, 2012, when Mr. Jones informed them that the appeal had been dismissed. Aronson Cert. at 3; Bayer Cert. at 2. Mr. Bayer states that Mr. Jones advised him that he understood from a conversation with the ALJ's staff attorney that the ALJ had not received the May 8, 2012 Meridian submission. Bayer Cert. at 2-3. Mr. Bayer asserts that, after filing the initial motion to vacate, Mr. Jones stated that he spoke again to the ALJ's staff attorney and learned that the May 8, 2012 submission had in fact been received but the appeal was dismissed for failure to respond to the ALJ's May 15, 2012 Show Cause Order II. *Id*. at 3.

Mr. Bayer's certification then avers that this report from Mr. Jones "was the first time that [Mr. Bayer] learned that an Order had been entered on May 15, 2012," and goes on to state as follows:

> I thereafter conducted a search of Mr. Aronson's files and found copies of Orders and other filings in this action, including the May 15, 2012 Order referenced by [the ALJ's staff attorney] in her discussion with my associate. I realized at that point that there was a serious ongoing service issue in this case and that numerous events had occurred in this appeal without any notice of such events being provided to me. Specifically, although I filed an Entry of Appearance on February 10, 2012, I was not served with copies of any of the Orders entered by the Court after that date or with copies of any documents filed by [CMS].

Id. Mr. Bayer acknowledged that he was an addressee on the documents and that Mr. Aronson received them, but contended he (Mr. Bayer) was not served. *Id*. at 3-4.

CMS replied to Meridian's motion to vacate the dismissal on July 30, 2012. CMS argued that the problem was not a failure of service on Meridian but rather "the complete lack of organization and communication" among the attorneys at the firm representing Meridian

and their "apparent lack of interest in pursuing Meridian's appeal . . ., as evidenced by the fact that the 'service' problems continued even after" Mr. Bayer became aware he was not receiving some documents in the case. CMS Reply at 2. CMS further contended that the accounts by Meridian's attorneys failed to adequately explain why Mr. Bayer filed no response to the Initial Order (which was admittedly transferred from Mr. Aronson to Mr. Bayer). CMS Reply at 10, 12. Meridian argued in support of its motion to vacate that the Initial Order was unclear and led it to believe that no readiness report was required because CMS had filed a motion for partial summary judgment. Meridian Br. in Support of Motion to Vacate at 15-16. CMS replied that the Initial Order clearly required each party to file a separate readiness report unless the parties agreed to a joint readiness report and that, in any case, Meridian's argument contradicted its claim that Mr. Bayer was unaware of CMS's motion because he was not served. CMS Reply at 12-13. Further, CMS pointed out that the notice of appearance identified the law firm as the counsel of record and that three different attorneys filed documents on behalf of Meridian in the case, so there was no basis for a claim that only Mr. Bayer represented Meridian. CMS Reply at 17. Therefore, according to CMS, no good cause existed to vacate the dismissal and the sanction was appropriate under applicable law. CMS Reply at 20.

On September 21, 2012, the ALJ issued the ruling denying the motion to vacate which is at issue in the present appeal (Ruling). The ALJ described the posture of the matter before him as "unusual and difficult" and acknowledged that the effect of his Ruling would be "severe," but stated that he had "no reluctance in concluding that its terms and its result are justified by the circumstances." Ruling at 1. After briefly recounting Meridian's noncompliance with his prior orders and the events set out above, the ALJ ruled as follows:

> [T]he July Motion simply does not achieve its necessary objective: the explanation or justification for its repeated failures to conduct its side of the litigation in a manner conducive to the speedy, orderly, and fair development of this case toward hearing. No reasonable definition of "good cause" encompasses the lapses Petitioner describes and often attributes to others. CMS has responded to the representations and arguments contained in Petitioner's July Motion in a particularly lucid and telling way, and I here explicitly adopt all of CMS's July 30, 2012 assertions, arguments and suggested conclusions as my own.

Ruling at 2.

Before submitting an appeal to the Board, Meridian sought to appeal the ALJ's Ruling directly to the Third Circuit Court of Appeals contrary to the requirements of the regulations. 42 C.F.R. § 498.82(a)(2). Counsel for CMS advised Mr. Bayer that Meridian had failed to exhaust its administrative remedies and further consented to Meridian's out-of-time filing of a request for review to the Board. Meridian Request for

Review at 2 (Dec. 12, 2012). By letter dated December 14, 2012, the Board extended the filing time and accepted Meridian's request for review, based on CMS's consent, the timely filing of the court appeal, and the finding that neither the ALJ's Dismissal nor his Ruling notified the parties of the right to Board review. The Board in the same letter also accepted Meridian's asserted incorporation by reference of its brief in support of its motion to vacate the dismissal before the ALJ in lieu of its filing a brief on appeal, contrary to Board guidelines which prohibit incorporation by reference of briefs previously submitted to the ALJ. Guidelines — Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's Participation in the Medicare and Medicaid Programs at http://www.hhs.gov/dab/divisions/appellate/guidelines/prov.html (Guidelines). It did so in light of the fact that the Guidelines were not provided directly to Meridian (as they customarily are with a notice of the right to Board review), even though they are available at the Board's website (as are the CRDP applicable to the ALJ level). CMS filed a response to the request for review (CMS Response) and Meridian filed a reply brief (Meridian Reply).

Legal Authority

Applicable regulations provide a right to an ALJ hearing and to review by the Departmental Appeals Board (Board) from CMPs imposed by CMS based on deficiencies found in a survey. 42 C.F.R. § 498.3(b)(13) (a finding of noncompliance by skilled nursing facility "that results in the imposition of a remedy" constitutes an appealable initial determination). Section 498.40(b) states that a hearing request must:

> (1) Identify the specific issues, and the findings of fact and conclusions of law with which the affected party disagrees; and
> (2) Specify the basis for contending that the findings and conclusions are incorrect.

Section 1128A(c)(4) of the Social Security Act (Act), made applicable to these proceedings by section 1819(h)(2)(B)(ii) of the Act, provides:

> The official conducting a hearing under this section may sanction a person, including any party or attorney, for failing to comply with an order or procedure, failing to defend an action, or other misconduct as would interfere with the speedy, orderly, or fair conduct of the hearing. Such sanction shall reasonably relate to the severity and nature of the failure or misconduct.

Section 1128A(c)(4) of the Act further provides that such sanctions may include prohibiting a party from introducing certain evidence or otherwise supporting a particular claim or defense, striking pleadings (in whole or in part), staying the proceedings, dismissal of the action, entering a default judgment, ordering the party or attorney to pay

attorney's fees and other costs caused by the failure or misconduct, and refusing to consider any motion or other action which is not filed in a timely manner.

Section 498.69 defines the circumstances in which an ALJ may exercise discretion to dismiss a hearing request as abandoned:

> (a) The ALJ may dismiss a request for hearing if it is abandoned by the party that requested it.
> (b) The ALJ may consider a request for hearing to be abandoned if the party or its representative —
>
> (1) Fails to appear at the prehearing conference or hearing without having previously shown good cause for not appearing; and
> (2) Fails to respond, within 10 days after the ALJ sends a "show cause" notice, with a showing of good cause.

Section 498.72 further provides: "An ALJ may vacate any dismissal of a request for hearing if a party files a request to that effect within 60 days from receipt of the notice of dismissal and shows good cause for vacating the dismissal."

Standard of Review

The Board reviews a disputed finding of fact to determine whether the finding is supported by substantial evidence on the record as a whole, and a disputed conclusion of law to determine whether it is erroneous. *See* Guidelines. The Board reviews an ALJ's finding about "good cause" to determine whether the ALJ abused his or her discretion. *Kids Med (Delta Medical Branch),* DAB No. 2471, at 4 (2012); *Chateau Nursing and Rehab. Ctr.,* DAB No. 2427, at 6 (2011) (and cases cited therein).

Analysis

1) Board review of ALJ dismissals

CMS suggests in its briefing that, while the regulations at 42 C.F.R. § 498.80 expressly provide for Board review of an ALJ dismissal, they do not identify a right to appeal an ALJ's decision not to vacate a dismissal. CMS Response at 3 n.1. Alternatively, CMS asserts that, if the Ruling is reviewable, the applicable standard would be abuse of discretion. *Id*. The Board has long recognized that where the regulation states that an ALJ "may" dismiss, dismissal is an exercise of discretion and reviewable as such. *See* Ruling on Request for Removal of Hearing to Board, *Four States Care Ctr.*, App. Div. Docket No. A-99-66 (June 7, 1999), attached to *Lakewood Plaza Nursing Ctr.,* DAB No. 1767 (2001). Thus, an abuse of discretion standard applies to the exercise of an ALJ's discretion, although any legal standard or factual finding underpinning the exercise of discretion would be subject to the standard of review applicable to law or facts. As far as

the reviewability of the Ruling, the Board has regularly reviewed ALJs' denials of motions to vacate dismissals under the same standards as the original dismissal order. *See, e.g., NBM Healthcare, Inc.*, DAB No. 2477 (2012); *Golden Living Center – Grand Island Lakeview*, DAB No. 2364 (2011), *remanded on other grounds, Golden Living Center – Grand Island Lakeview v. Sebelius*, No. 8:11CV119, 2011 WL 6303243 (D.Neb. Dec. 16, 2011), *reconsideration denied*, 2012 WL 2685001 (D.Neb. July 6, 2012).

In reviewing an ALJ's exercise of discretion to dismiss an appeal for abandonment (and to decline to vacate that dismissal), the Board must balance the importance of preserving a party's statutory hearing rights with the need for fairness, integrity, and timeliness in the processing of appeals. Thus, "in affirming the ALJ's exercise of discretion to dismiss this case, the Board is mindful of the fact that it is foreclosing a party's right to review of the agency's action." *High Tech Home Health, Inc.*, DAB No. 2105, at 15 (2007), *aff'd*, *High Tech Home Health, Inc. v. Leavitt*, Civ. No. 07-80940 (S.D. Fla. Aug. 15, 2008). Therefore, the Board will not treat as justified a dismissal based on "minor procedural grounds" where a party might be caught unaware or lack adequate notice and opportunity to amend and return to compliance with outstanding orders and obligations. *High Tech* at 14-15.

No definition of 'good cause' appears in the applicable regulations, and the Board has not attempted to set out an "authoritative or complete definition of the term 'good cause'." *Hillcrest Healthcare, L.L.C.*, DAB No. 1879, at 5 (2003). Here, again we need not do so because, as explained below, we agree with the ALJ that "no reasonable definition of 'good cause' encompasses the lapses" for which Meridian (or its representatives) is responsible. Ruling at 2; *see also Brookside Rehab. & Care Ctr.*, DAB No. 2094, at 7 n.7 (2007). However, although the Federal Rules of Civil Procedure do not apply in these proceedings, the Board has at times looked to Rule 41(b) jurisprudence for helpful guidance in reviewing the circumstances on which a dismissal is based. *See, e.g., Chateau Nursing & Rehab. Ctr.*, DAB No. 2427, at 8-11 (2011); *Osceola Nursing & Rehab. Ctr.*, DAB No. 1708, at 11 (1999).

In that regard, both parties briefed a leading case from the Third Circuit (in which Meridian is located) as a source of appropriate considerations in that process. *Poulis v. State Farm Fire & Cas. Co.*, 747 F.2d 863 (3d Cir. 1984).[2] CMS Response at 26-30; Meridian Reply at 5-7. Six factors are to be weighed in determining whether a trial court abused its discretion in dismissing an action:

[2] Meridian also cites several Fifth Circuit cases for the proposition that dismissal is a severe sanction and appropriate only when the party's conduct in some way threatens the integrity of the process. Meridian Response at 3, citing inter alia *McNeal v. Papasan*, 842 F.2d 787 (5th Cir. 1988). We do not see that this line of cases from a different circuit adds much to the analysis and therefore do not discuss these cases in detail.

1. The extent of the party's personal responsibility;
2. Prejudice to the other party;
3. A history of dilatoriness;
4. Willfulness or bad faith;
5. The effectiveness of lesser sanctions; and
6. The meritoriousness of the claims or defense.

Poulis at 868-70. The *Poulis* court recognized, as has the Board, that the dismissal of entire matter is a drastic, even extreme remedy, not to be lightly undertaken. *Id.* at 867-68. At the same time, the court did make clear that, even if the party had not personally failed to comply with court orders, dismissal may be appropriate "because a client cannot always avoid the consequences of the acts or omissions of its counsel." *Id.* at 868. The Third Circuit has explained that it is not necessary that all the factors or some particular combination be present to justify dismissal. *Parks v. Ingersoll-Rand Co.*, 380 F. App'x 190, at 194 (3d Cir. 2010).

With these considerations in mind, we turn to the question of whether the ALJ abused his discretion by concluding that dismissal was called for under the circumstances presented in this case.

2) Meridian's challenge to the ALJ's dismissal and refusal to vacate

The question of where responsibility lies for the repeated failures to make required filings and to prosecute the appeal with any diligence is central to the reason for the ALJ's ultimate decision to dismiss the case. Neither the ALJ nor CMS attributed personal responsibility to Meridian but both held its counsel to blame. Ruling at 2, adopting CMS Reply at 18-21. Meridian, on the other hand, attributes all responsibility to the ALJ and CMS, asserting that "[b]ased upon error by the court below" Meridian was precluded from showing good cause because its "litigation counsel" never received notice of the ALJ's issuances. Meridian Reply at 2.

We find unsupported on the record Meridian's attribution to the ALJ of "error" in the manner of service of his orders on Meridian's counsel. In fact, the "notice of appearance" filed by Mr. Bayer, along with the other actions of members of his firm, created the "snafu" of which he complains. Meridian Reply at 2. The Initial Order required all attorneys participating the case to file notices of appearance. The only formal notice of appearance filed at any point by counsel for Meridian was signed by Mr. Bayer but stated that the firm was the counsel representing Meridian. The assertion that "[t]his firm represents" Meridian is reiterated at the start of virtually every document filed on Meridian's behalf both before the ALJ and before the Board. *See, e.g.*, Meridian Reply at 1. The actions taken in this litigation contradict any possibility that the notice of appearance was intended to indicate that Mr. Bayer was sole counsel. It is undisputed that Mr. Aronson thereafter conducted the consultations with CMS counsel required by

the Initial Order without filing any notice of appearance or even suggesting to CMS counsel that he was no longer representing Meridian or lacked authority to appear for it. Furthermore, Mr. Jones acted on Meridian's behalf in making filings without filing any independent notice of appearance. If Meridian's counsel actually believed that the notice filed constituted an appearance only by Mr. Bayer, every consultation and filing undertaken by Mr. Aronson and Mr. Jones was in direct defiance of the requirement that all counsel file notices of appearance.

As noted above, the ALJ's office sent every issuance to the firm with the names of all counsel who had participated in the matter listed as addressees. Neither of the declarations submitted by Meridian explains why the firm directed all the mailings solely to Mr. Aronson if he was no longer assigned to the matter. Even if we accepted as reasonable Mr. Aronson's extraordinary assertion that he felt free to ignore the ALJ's orders on the assumption that they were mere courtesy copies, that does not justify his failure to indicate to CMS counsel that he was supposedly no longer authorized to represent Meridian or to refer the consultations to Mr. Bayer. In short, Mr. Aronson's position seems to be that he was simultaneously freed from any responsibility to comply with the court's orders but entitled to present himself as appearing for Meridian when it suited him.

Careful review of the record also demonstrates that the ALJ's rejection of the explanations offered by Meridian's counsel for their conduct was supported by substantial evidence in that the claims have been internally inconsistent and disingenuous. Meridian argued before the ALJ, and reiterates before the Board, that it could not be expected to demonstrate good cause for its failure to comply with the ALJ's orders because the ALJ's own error in serving the wrong lawyer made that impossible. Meridian Reply at 2. This position wholly fails to explain the fact, pointed out by CMS in its brief below and adopted by the ALJ in his Ruling, that Mr. Aronson declares that he gave the file on this case to Mr. Bayer when Mr. Bayer was to take over as "litigation counsel." CMS Reply at 10-12; Aronson Cert. at 2. At that time, the ALJ's Initial Order had already been issued, and Meridian does not deny that it had been properly served on Mr. Aronson (as Mr. Bayer had not yet appeared). Mr. Bayer thus had timely notice of the Initial Order and took no steps to comply with it. At no point, even now on appeal, has Mr. Bayer provided a plausible explanation of this complete failure. The only purported justification was the argument that Meridian was confused about whether the Initial Order still required Meridian to make its own submission once CMS filed its partial summary judgment motion. Meridian Br. in Support of Motion to Vacate at 15-16. The ALJ reasonably did not credit this claim, given that Mr. Bayer also alleged that he did not receive the CMS motion because it too was not properly served on him. Bayer Cert. at 2. Indeed, we find that making these claims which are so inconsistent on their face undercuts the credibility of Meridian's counsel. In any case, it seems evident that, if Mr. Bayer did not know that an opposing party's motion existed, then he has no excuse

for ignoring the Initial Order because of supposed confusion about his duties under the Order once his opponent filed a motion.

Mr. Aronson reports that he did notice when Show Cause Order I appeared in his inbox in late April 2012 and notified Mr. Bayer who then obtained the order from him and arranged for Mr. Jones to file the first response. Aronson Cert. at 3; Bayer Cert. at 2. Yet neither attorney explains why this discovery did not suffice to alert them to the possibility that correspondence in the case was being directed to Mr. Aronson rather than Mr. Bayer although addressed to both of them. Instead, Mr. Bayer states that he did not hear "anything further" about this appeal until Mr. Jones informed him of the dismissal. Bayer Cert. at 2. Only after Mr. Jones spoke to the ALJ's staff attorney twice and learned that the reason for dismissal was Meridian's failure to respond to Show Cause Order II did Mr. Bayer undertake to review Mr. Aronson's file some time after June 19, 2012. Bayer Cert. at 3-4. The ALJ did not err in concluding that Meridian's counsel bore responsibility for any lack of awareness of the outstanding issuances and rejecting the premise that its inaction in prosecuting the appeal and complying with orders was caused by inadequate service by the ALJ.

The posture of the matter by the time the ALJ issued his Ruling was most similar to that of the appeal in *B&K Nursing Ctr.*, DAB No. 1901 (2003). The petitioner in *B&K Nursing* failed to respond to multiple ALJ orders and correspondence, and then contended that the dismissal should be vacated because it had not received them and had not been contacted. *B&K Nursing* at 3-5. The Board found that the record included receipts showing that counsel had been served. *Id*. at 4-5. The Board concluded that "B&K's lack of responsiveness to either the ALJ or opposing counsel supports the ALJ's ultimate determination that B&K had abandoned its request for hearing." *Id*. at 5. Meridian attempts to distinguish *B&K Nursing* on the grounds that the claim that B&K did not receive the ALJ orders was "unsubstantiated and unexplained," whereas Meridian has "substantiated the undisputed fact that the ALJ's notices were being sent to an attorney who was not the attorney of record" and that the fact that "both attorneys worked in the same office" is "of no legal moment." Meridian Reply at 2-3. On the contrary, it was reasonable for the ALJ to conclude that Meridian's lack of responsiveness was the result of a lack of interest in prosecuting its appeal given that the ALJ sent all issuances to every attorney that appeared in the matter at the firm which purported to be counsel of record.

The Board has recognized that abandonment may be established by failure to file required submissions even prior to a hearing date, but has been reluctant to permit dismissal and loss of hearing rights where an ALJ has not provided clear directive or provided sufficient opportunities to explain or cure noncompliance. *See, e.g., Chateau Nursing and Rehab. Ctr.* (circumstances of petitioner's failure to respond to order requiring appearance of substitute counsel following counsel of record's withdrawal did not warrant dismissal under Act section 1128A(c)(4); did not constitute abandonment

under section 498.69(b) where ALJ failed to issue show cause order); *Osceola Nursing & Rehab. Ctr*. (reversing dismissal for abandonment under section 498.69(b) and Act section 1132 where "record is incomplete" and ALJ orders "not sufficiently clear" to permit conclusion that petitioner's failures to respond resulted from willfulness, bad faith, or fault). We find no ambiguity in the ALJ's orders here that could justify Meridian's failure to respond or to seek any needed clarification. In addition, the ALJ issued not one, but two, orders to show cause putting Meridian on ample notice that its appeal stood in danger of dismissal. The inability of the attorneys at the firm representing Meridian to ensure that mail was delivered to the addressee within the office with current responsibility to act in the case at any given time is hardly an adequate explanation for the failure of any the firm's attorneys to take action on behalf of their client in the face of these orders.

To the extent that the Third Circuit's analysis of the bases for dismissals provides useful guidance, we do not find that it alters our view. No personal blame attaches to Meridian, although its representatives are not without responsibility. CMS asserts some prejudice to its ability to litigate the case effectively as the passage of time may interfere with witnesses' memories, which Meridian hotly denies. CMS Response at 27; Meridian Reply at 6. This factor provides some support for dismissal, but we are particularly concerned about the history of dilatoriness displayed by Meridian's counsel as laid out above. At virtually every turn in the administrative proceedings, counsel failed to respond to ALJ orders, acted in contradiction of applicable administrative procedures and rules, fell short of prosecuting the appeal in a timely manner, and sought to deflect all responsibilities for these shortcomings onto others. While we do not characterize counsel's conduct as being willful or in bad faith, we do find the repeated attempts to attribute blame to the ALJ or CMS for their own negligence to be "self-serving." *Parks v. Ingersoll-Rand Co*., 380 F. App'x at 195 ("Willfulness involves intentional or self-serving behavior."). As far as alternative sanctions, Meridian does not suggest, and we do not see, what alternative sanctions would be likely ensure that counsel would cure and not repeat the pattern of noncompliance and negligence. As in *High Tech*, the ALJ issued "a series of orders with well-delineated requirements and consequences" over an extended period of time which did not suffice to elicit compliance or diligence "despite their precise language and emphatic warnings." *High Tech* at 16. Here, as in that case, lesser measures were not sufficient and we therefore find "dismissal fair and appropriate." *Id.* We express no opinion on the ultimate merits of the case.

As the Board stated in *Guardian Care Nursing & Rehab. Ctr.*, DAB No. 2260, at 21 (2009), we have "overarching responsibility to ensure the efficiency and integrity of proceedings before the Departmental Appeals Board as a whole, which encompasses a concern that the orders of ALJs not be disregarded by counsel without consequence." Where counsel's neglect and delay bordered on contempt for the process and repeated attempts were made to obtain compliance, we cannot find that the ALJ abused his discretion by declining to vacate his dismissal order.

Conclusion

We affirm the ALJ Dismissal and Ruling.

/s/
Stephen M. Godek

/s/
Constance B. Tobias

/s/
Leslie A. Sussan
Presiding Board Member